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# An experiment with small claims mandatory conciliation

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# ADR bulletin

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## ADR initiatives in Germany

# An experiment with small claims mandatory conciliation

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In this article I look at recent developments in Germany where an experimental scheme for mandatory mediation and conciliation in small claims civil disputes was introduced in 2000. This gave rise to a variety of different models practised in the different states of Germany, ranging from the traditional 'wise counsel' conciliation to processes which have more in common with early neutral evaluation or settlement mediation.

The results of three government-sponsored reports on the models adopted in the states of North Rhine-Westphalia,<sup>1</sup> Baden-Württemberg<sup>2</sup> and Bavaria<sup>3</sup> are now available and provide valuable insights into the advantages and disadvantages of mandatory mediation and conciliation schemes. It should be noted that the terms mediation and conciliation are used interchangeably. The official German word used by the legislator is 'Schlichtung' which translates into the English 'conciliation'. However, the official reasoning behind the scheme indicates that the use of mediation processes was envisaged by the legislation. To clarify some of the peculiarities of the different models it will be necessary to explain in brief the statutory background of the conciliation legislation.

### Handling of small claims disputes under German civil procedure rules

According to s 23 No 1 *Courts Constitution Act* (Gerichtsverfassungsgesetz, GVG) all civil disputes with a dispute value under 5,000 Euros fall under the jurisdiction of the Magistrates' Courts (Amtsgerichte). There are no special small claims tribunals or courts. German courts lack the ability to implement their own rules of procedure. All provisions for court procedure are found in the federal *Code of Civil Procedure* (Zivilprozessordnung, ZPO) and the *Introductory Act to the Code of Civil Procedure* (Einführungsgesetz zur Zivilprozessordnung, EGZPO). In 1999 the federal legislator amended the EGZPO and introduced s 15 of EGZPO as a basis for state-regulated mandatory conciliation schemes. The new rule reads as follows:<sup>4</sup>

- (1) It can be regulated by state law that a court action can only be filed after there has been an attempt to reach an amicable agreement before a conciliation centre which is established and accredited by the state judicial administration,
  1. in claims arising from property disputes before the Magistrates' Court, where the value of the claim does not exceed 750 Euros,
  2. in disputes concerning claims under the law of neighbours according to ss 910, 911, 923 of the Civil Code and s 906 of the Civil Code as well as according to state laws referring to Art. 124 of the Introductory Act to the Civil Code, and where the effects concerned do not originate from a business,
  3. in disputes concerning claims arising from defamation, which has not been committed in the press or broadcasting media.
- (2) Together with the court action the plaintiff has to lodge a certificate of a failed attempt



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to conciliate issued by the conciliation centre. This certificate must also be issued on application by the plaintiff if the plaintiff has applied to have the dispute conciliated and the conciliation has not been conducted within three months of the application.

(3) Section (1) does not apply to

1. actions according to ss 323, 324, 328 of the Code of Civil Procedure, subsequent actions and actions which have to be delivered within a limited time as specified by law or by the court,
2. disputes concerning issues of family law,
3. new hearings,
4. claims that have been stated according to summary procedure where the plaintiff relies entirely on documentary evidence or according to summary draft claim procedure,
5. the commencement of a trial for claims that have been stated under the rules of summary legal dunning procedure,
6. actions that concern measures of enforcement, particularly those according to the 8th Book of the Code of Civil Procedure.

The same applies to disputes, where the parties do not have residence in the same state or where they do not have their place of business or a branch office in the said state. ...

(5) Further details are to be regulated by the law of the state; it can also restrict the scope of section (1), extend the exceptions of section (2) and order that the conciliation centre may only process a case under the condition that an advance payment is made and that the conciliation center shall have authority to order a fine against a party which does not attend the conciliation attempt.

(6) Conciliation centres under this rule can also be accredited according to state law. Agreements reached before a conciliation center are agreements according to s 794 of the Code of Civil Procedure.

The new rule does not define what the term conciliation means and who provides for the mandatory conciliation. Section 1 refers to disputes governed by the law of neighbours. This includes disputes about overhanging branches from neighbouring properties, about drains which affect more than one

property and other emissions, as well as disputes concerning boundary stones and markers. Section 2 provides that the conciliation attempt must be conducted even before the court action is filed and evidence of failed conciliation must be part of the statement of claim.

The most important exception from mandatory conciliation is found in section 3 no 5 where claims that were filed in summary legal dunning procedures are exempt from mandatory conciliation. In legal dunning procedure claims are filed by submitting a special form to the Magistrates' Courts handling those procedures in the respective state. On the form the plaintiff states the amount s/he claims and briefly the grounds for this claim (for example, 'sales contract'). No evidence or further documentation is required. The defendant has two weeks after the legal dunning claim has been served to reject the claim, otherwise the plaintiff can apply for an enforceable court order which is then issued. If the defendant repudiates the claim the procedure is transferred to the Magistrates' Court and the matter goes to trial. Only then is the plaintiff required to provide a statement of claim and name evidence.

When the provision was discussed in federal parliament, it was reasoned that court waiting lists within the civil justice system had significantly increased since the beginning of the 1990s and that most efforts by the federal government to speed up procedure and to cut costs had only succeeded marginally.

Therefore, it was argued, new instruments were needed so that the scarce financial resources of the justice system were more efficiently used and more service, transparency and peace was provided to citizens. It was further argued that ADR could provide such instruments and thereby relieve the judiciary and improve peaceful dispute resolution. Disputes could be processed and resolved more quickly and cheaply and lasting peace between parties was more likely than through the conventional court system. Pre-trial conciliation could address facts that were important to the parties but were of no legal consequence and as such could not be taken into account by the courts.<sup>5</sup> Through the exceptions in section (3), already available summary

procedures for legal dunning, documentary evidence and claims arising from drafts should still be available and should be exempt from mandatory conciliation. It was reasoned that this was necessary because legal dunning procedures were well established and already settled approximately 35 per cent of all small claims disputes.<sup>6</sup>

The new provision acquired the nickname 'experimentation clause' (Experimentierklausel) as it opened the way for all states to implement conciliation schemes as they saw fit. Eight out of the 16 states that comprise Germany have enacted legislation for mandatory conciliation. Three different models have emerged from the legislation and are explained further below.

### The laymen model – between wise counsel and evaluative mediation

Six out of eight participating states opted for a model in which conciliation services are provided by conciliators who do not have a specific legal or social background. The reason for this is that four of those states employ what in German is called 'Schiedsleute'. The tradition of the 'Schiedsman' or 'Schiedsfrau' (male or female lay conciliator) goes back to Prussian tradition. Schiedsleute are volunteers who are elected by the community and who facilitate dispute settlement without the authority to determine the dispute.<sup>7</sup>

All states that follow the Schiedsleute tradition have enacted state legislation which regulates the eligibility, election procedure and conduct of the Schiedsleute. It is a voluntary office performed by respected members of the local community. Often entry requirements such as a minimum age of 30 and character prerequisites exist. Originally Schiedsleute mediated only in civil disputes but later on minor criminal matters that were not dealt with by prosecution (such as defamation) were included and victims had to undergo such victim-offender mediation before they could sue the perpetrators. Before the implementation of mandatory conciliation this victim-offender mediation had become the predominant part of the Schiedsleute service. The administration and supervision of the

Schiedsleute rests with the regional Magistrates' Court, while costs of maintenance of the Schiedsleute office are born by the town or district administration.

There are no training requirements for Schiedsleute but practically all are members of the Union of German Schiedsmänner and Schiedsfrauen (Bund Deutscher Schiedsmänner und Schiedsfrauen e.V.) where they undergo an introductory training course and later on one course each for conciliation in criminal and civil matters. The later courses also contain brief introductions to the concept and practice of mediation.<sup>8</sup>

Schiedsleute often conduct conciliations at home and without the help of administrative staff. The research by Röhl and Weiß established that nearly half the time that is allocated for the conciliation session is used to allow parties to explain their view of the facts and of the case history. After that the Schiedsman or Schiedsfrau often suggests a solution or compromise and tries to persuade the parties to accept it.<sup>9</sup> If an agreement is reached this agreement is enforceable according to the *Code of Civil Procedure*. If no agreement is reached the Schiedsman or Schiedsfrau issues a certificate that the attempt has failed. The Schiedsleute use an extensive array of forms and guidelines for different stages in the procedure which has given rise to criticism by some researchers that the procedure is too formal and inflexible.

Because of their standing in the community and their advisory role extending to the content of the dispute, Schiedsleute can best be described as *wise counsel* mediators. They often give participants the opportunity to describe their views of the dispute and sometimes probe into underlying issues that are not openly acknowledged by the parties. On the content of the dispute they take a more directive and interventionist approach, often suggesting compromises and agreements and persuading parties to accept them.<sup>10</sup> Schiedsleute can be seen as the German version of community justice/mediation centres. They are members of the community (in fact Schiedsleute have to be residents of the community in which they work), often well-known and respected by their

peers. Under two schemes they also provide extended victim-offender mediation services for courts.

Schiedsleute are the primary resource for conciliation services in the states that have enacted laymen schemes. In addition most schemes also allow other conciliators to apply for accreditation by the state judicial administration. There are no special prerequisites for such accreditation. Some states actively encourage the establishment of community conciliation centres to supplement the work of the Schiedsleute. A number of these have been established over the course of the last years, some of them supported by European Union initiatives. Many of them are registered as conciliation providers for mandatory conciliation. Since the Schiedsleute tradition is in great decline this could be a way to secure the availability of future community-based mediation services.

The opportunity to register as a conciliator under a scheme has also been taken up by many lawyers, thereby extending their service portfolio. It needs to be noted that the conciliation scheme as a whole was rejected by the German legal profession which branded it as time-consuming, unnecessary and ill-conceived.<sup>11</sup> Finally there are so-called 'other conciliation centres' which are mainly provided by industry bodies and have often existed as ombudsmen or complaint-handling centres prior to the introduction of mandatory conciliation.

### The notary model – facilitative and evaluative mediation

Bavaria was never part of the Prussian Schiedsleute tradition and so there exists no traditional network of conciliators. The Bavarian government decided to rely on the State Association of Public Notaries of Bavaria (Landesnotarkammer Bayern)<sup>12</sup> to provide a network of conciliation centres that would be accessible state-wide. According to state law all Bavarian public notaries are conciliation centres. In addition to this, lawyers can register as conciliators. Additional conciliation centres are provided by special industry bodies, for example in the construction industry.

Bavaria did not pass legislation relating to training prerequisites or



accreditation standards for conciliators. The State Association of Public Notaries provides mediation and negotiation training for all trainee notaries and informs about new trends in mediation through internal publications. All notaries are informed about the legal and practical implications of the conciliation scheme and forms and checklists for conciliations were provided.

Conciliation styles used by Bavarian notaries vary. In most conciliations parties have the opportunity to explain the background of the dispute and give account of their view of the situation. While some notaries employ facilitative problem-solving styles, others evaluate the legal implications of the dispute and present their analysis of the dispute to the parties to help them reach agreement.<sup>13</sup> Mediation services provided by registered lawyers tend to be either evaluative, in that they foreshadow a likely court decision on the basis of relevant law (and therefore could also be called neutral evaluation), or settlement-oriented in that the lawyer-mediator suggests a compromise and asks the parties to agree. This style will be further explained in the next section.

### **The lawyer model – evaluative and settlement mediation**

The third model, enacted in the state of Baden-Württemberg, relies almost exclusively on practising lawyers as conciliators. It differs from the other two approaches in that plaintiffs do not approach the conciliator directly but file their claim at conciliation centres which are established at every Magistrates' Court. These are staffed by clerks of the court. Conciliators themselves are appointed by the bar association and are lawyers practising in the relevant court district. The conciliator lists are restricted and non-lawyer conciliators can only be appointed if there are not enough lawyers available.<sup>14</sup>

Again no training prerequisites are mentioned and only limited training was provided by the bar association or the courts for conciliators or referral clerks. Only about 30 per cent of lawyer conciliators attended training programs for mediation or conciliation.<sup>15</sup> It is not surprising that the report by Treuer and Hoffmann describes the mediation style

used by the majority of lawyer conciliators as evaluative with a focus on the legal ramifications of cases. They advise on the facts and legal implications of the matter, present a settlement proposal and suggest that the parties accept it. Conversely conciliators who indicated that they had previously undergone mediation training almost exclusively used a facilitative and problem-solving mediation style.<sup>16</sup> Many participants describe the conciliations as similar to the stage of a civil trial in which the German judge hears the dispute and then tries to settle it before evidence procedures are started. However since conciliators do not have the authority and respect attributed to judges the legal advice they give does not carry the same weight as a judge's opinion.<sup>17</sup> Many conciliation sessions are finished in less than one hour, which correlates with low settlement rates and confirms the hypothesis that mediation takes time to achieve lasting resolutions of disputes.<sup>18</sup>

The evaluative model of lawyer conciliation in Baden-Württemberg permeates the whole scheme. Treuer and Hoffmann report that legal representatives often prepare for conciliation by filing a statement of claim similar to one used to file court action. There is evidence that such conciliation statements are re-used to initiate court action after conciliation has failed. This confirms the rights-based advisory style in which conciliation is practised in Baden-Württemberg.<sup>19</sup>

### **Effects of mandatory conciliation**

It can be difficult to measure the success of an ADR or case management project. Often cases that fall under conciliation or mediation schemes terminate without being settled or adjudicated.<sup>20</sup> The three reports from Germany differ significantly on the basis of empirical data and many findings are questionable in terms of external or internal validity. Therefore research findings are somewhat perfunctory and should be taken with a grain of salt. Much of the data is still more anecdotal than empirical, with low numbers of participants in surveys and no court statistics available to compare data. The

following section gives an overview of the most remarkable effects that conciliation has caused in the three states that have published reports.

### **Relief of the judiciary**

What makes the German conciliation models interesting is the state-wide application and the significant number of disputes processed by the conciliation centres. For example, the centres of the state of North Rhine-Westphalia processed more than 10,100 disputes in 2002. Even though this must be seen in relation to the caseload of the Magistrates' Courts which processed more than 362,000 matters in the same year, the conciliation scheme covers a large number of disputes and therefore potentially provides valuable information about the success of mandatory conciliation.<sup>21</sup> Figures from the two other states from which reports are available show lower numbers but still cover several thousands of conciliations since the state conciliation Acts were imposed.

### **Success of mandatory conciliation**

Overall the impact of conciliation on the management of small claims is still very low, if not insignificant. No measurable relief of the judiciary could be determined.<sup>22</sup> Intake of new civil matters with a dispute value under €750 did not decrease at all, and in some states an actual increase was reported. Fluctuations in caseload over the course of the last few years follow normal patterns.

Explanations for this occurrence refer to the restricted field of application of mandatory conciliation to neighbourhood, defamation and small claims disputes only, whereas the Magistrates' Courts handle any kind of dispute with a claim value of up to €5000.<sup>23</sup> Another explanation for the meager success that conciliation has yielded is the increase in legal dunning procedure cases which are exempted from the requirement of pre-trial mediation. North Rhine-Westphalia, for example, reports an increase of almost 20 per cent in trial cases after failed legal dunning procedures since the introduction of mandatory conciliation.<sup>24</sup> Figures from other states are similar. Many lawyers admitted that

they filed claims under legal dunning procedures to circumvent the conciliation scheme and there is evidence of deliberate attempts to use legal dunning procedures even in cases where there was a claim for specific performance and therefore claims under legal dunning procedures were inadmissible.

Settlement rates of German conciliators are comparatively low. The highest rate was achieved by the Schiedsleute in North Rhine-Westphalia who settled between 55.3 per cent and 58.5 per cent of all cases between 2001 and 2003.<sup>25</sup> In Baden-Württemberg, where conciliation was provided exclusively by lawyers, settlement rates were lower, varying between 19 per cent and 22 per cent.<sup>26</sup> Greger reports that settlement rates in Bavaria for notary conciliators and lawyer conciliators are almost equivalent at 26 per cent.<sup>27</sup> Agreement is most likely in neighbourhood and defamation disputes, with higher settlement rates reported for those than for disputes over property. From observations of a random sample of conciliations Greger found that in Bavaria notaries mediate more successfully than lawyers. Lawyer-conducted conciliations failed in 38 per cent of cases whilst notaries failed only in 25 per cent.<sup>28</sup> Lawyers also mediated less successfully than Schiedsleute in North Rhine-Westphalia.

Even though conciliation shows a low success rate compared to court-related mediation schemes in other countries, especially the US and Australia, it seems to perform a filtering function nonetheless. Greger found that in Bavaria only 37 per cent of all disputes in which conciliation failed did actually proceed to court.<sup>29</sup> Whether this marks some sort of reality-testing process through conciliation or whether conciliation actually inhibits a plaintiff's access to justice could not be determined. Interestingly a settlement before the court is still possible in cases where the conciliation attempt failed. According to Greger, of the 37 per cent of failed conciliations that proceed to court, 31.5 per cent end in judicial settlement and 41.9 per cent with a court decision.<sup>30</sup>

Many conciliations did not succeed because the defendants did not appear.

Since most of the states have not enacted provisions for fines to be issued to defendants that do not appear, and enforcement of these provisions is difficult in any event, many defendants manage to evade conciliation. All reports suggest an amendment of s 15 of EGZPO to impose the costs of a conciliation on the defendant where conciliation failed because of non-appearance by the defendant. This would provide a higher incentive for defendants to appear for pre-trial mediation.

### **Availability of conciliation services**

All three models have established dense networks of conciliation providers. This has also resulted in a surplus of conciliation centres in these states. Most centres process only between one and five cases per year. This works well for voluntary conciliators like the Schiedsleute in North Rhine-Westphalia and even for public notaries in Bavaria since it is only a minor part of their workload. Lawyer-conciliators, on the other hand, complain about low remuneration and the lack of a cost-value relationship. Conciliation rarely precipitates an increase in new clients for lawyer-conciliators. Germany has doubled its number of lawyers within the last 10 years and many young practitioners complain about insufficient workload to run their practices. Mandatory conciliation obviously did not provide new markets for an already overpopulated profession. Where at first practitioners eagerly registered as conciliators, now feelings of resignation are spreading. Conciliation has also failed to change the dispute culture towards more peaceful dispute resolution and co-operative problem-solving. Case numbers and backlogs of Magistrates' Courts have seen no significant decrease, therefore adjudication is still the primary method of dispute resolution in Germany. There is also no measurable increase in workload for industry-related dispute-handlers or complaint-processing centres.

### **Stakeholder assessment of mandatory conciliation**

Similarly the attitude of the legal profession towards mandatory

conciliation and ADR has not improved. Scepticism and outright rejection of any ADR techniques still permeate wide parts of the judiciary and the bar associations. Contrastingly Röhl and Weiß found that legal representatives who participated in conciliation sessions almost unanimously reported positive experiences regarding the process.<sup>31</sup> Similar observations were made from party statements.

Parties assessed the opportunity to describe the dispute to a neutral facilitator as very helpful and almost always commented positively on the fair and impartial handling of disputes by conciliators. This observation was made in several of the schemes, regardless of the identity of the conciliator (layman, notary or lawyer). Participants also regarded impartiality and fairness as the most important features of the process and there is evidence that the prospect of amicable settlement is increased where the defendant feels that they have equal standing and influence in the mediation process.<sup>32</sup> Anecdotal evidence also points to the fact that the resolution of the dispute is not obstructed by the involuntary nature of the process. Röhl and Weiß conclude that the participants' will to settle remains independent of whether they are compelled to conciliate or not.<sup>33</sup> Treuer and Hoffmann discovered from a comparison of mediation styles used by lawyer conciliators in Baden-Württemberg that a facilitative problem-solving mediation style has greater chances of success in property disputes than an evaluative style that concentrates on legal rights. Based on this discovery, they argue that lawyer conciliators need to be trained more thoroughly in interest-based negotiation techniques.<sup>34</sup>

### **Procedural effectiveness**

In terms of procedural effectiveness it becomes obvious that most conciliations are conducted in a timely manner and help reduce the overall transaction time for the settlement of the dispute. Where conciliation is successful an agreement can be reached within four to six weeks from the lodgment of the claim. This makes conciliation in some states considerably quicker than adjudication. Where laymen conciliate disputes Schiedsleute are the quickest and most



efficient providers, while lawyers and bar association conciliation centres often exhaust the time limits under the respective conciliation Acts. Schiedsleute are also the least expensive conciliators. Depending on the success of the conciliation, fees range from €20 to €60 for the whole procedure. Lawyer conciliators charge between €80 and €120. It has to be noted that there is no cost advantage when compared to the costs of trial in a Magistrates' Court. In Germany these costs are regulated by the *Court Fees Act* (Gerichtskostengesetz, GKG) and are substantially lower than in most common law jurisdictions. As with the remuneration of legal representatives, the costs of a trial depend upon the value of the claim in dispute.

It was found that agreements reached by way of conciliation have a compliance rate of approximately 75 per cent and that compulsory enforcement of agreements is rarely necessary. Due to their content not all agreements are enforceable but this often does not negatively affect the participants' assessment of conciliation.<sup>35</sup> The costs of conciliation centres in states under the laymen schemes are borne by communities. With an average cost of €790 per conciliation centre per year these costs should be bearable for almost any community in Germany.

All reports found that conciliation is most effective in neighbourhood and defamation disputes and a lot less effective for disputes over property which involve monetary claims. This is again partly the result of the escape into legal dunning procedures, which can only be used in, and are often used in, property claims. Only an amendment of s 15 of EGZPO can change this escape option. But such an amendment has to be implemented by the federal government. One suggestion is that claims lodged under legal dunning procedures proceed to mandatory conciliation once the defendant objects to the claim. This would preserve the speedy and efficient legal dunning process but close the door to circumvention of pre-trial conciliation.<sup>36</sup>

On the other hand there are small claims disputes that do not seem to be suitable for conciliation but do currently fall under the scheme. Among those are

claims by energy providers for specific performance. The specific performance required is always the right to enter the property of the customer to access the electricity meters. In more than 90 per cent of the cases defendants do not answer the claim and do not appear for conciliation. The matter then has to proceed to court. Even in the cases where defendants do appear there is often no basis for negotiation because the option of deferment of payment has already been exhausted before the lodgment of the claim by the energy provider. Another area where mandatory conciliation leads to an unnecessary extension of the trial process is in disputed insolvency claims. From these occurrences it becomes obvious that the value of the claim (up to €750) is not an appropriate criterion to differentiate between disputes suitable for conciliation and those that are not.

### Discussion and critique

The current mandatory conciliation scheme has been the focus of much heated discussion for a long time. The current experimental clause of s 15 of EGZPO is actually the second attempt by the federal government to change the disputing culture and introduce more client-centred dispute resolution practices to the legal landscape of Germany. Like other ADR and particularly mediation projects, this one was resisted by the legal profession from the very beginning. Many lawyers feel threatened by new and unfamiliar ways of dispute resolution; many judges distrust dispute resolution by laymen and feel that only they (judges) have the necessary education and training to settle disputes. The emphasis on legal education points to a failure to understand the concept of facilitative mediation, in which the mediator empowers and educates the parties by allowing them to own their dispute and by not deciding it for them.

### Mandatory conciliation – an experiment designed to fail?

Mandatory conciliation in Germany has been described as a failure right from the beginning.<sup>37</sup> The statistics to date seem to support this argument. When compared with the goals stated by the federal government in justification

for the introduction of s 15 of EGZPO, it becomes clear that none of these goals has been met. Court lists have not been reduced; judges state no significant relief and court clerks in Baden-Württemberg actually complain about an increase in work because now they also have to act as conciliation intake centres. Moreover, there is absolutely no evidence that the dispute culture has changed towards more peaceful and constructive solving of social conflict. The increase in legal dunning procedures clearly marks mistakes in the drafting of the new experimental provision and, in effect, provides a backdoor for determined lawyers and plaintiffs to circumvent the scheme. Lastly, seven of eight German states which have implemented mandatory conciliation contain a sunset provision according to which most schemes will finish by the end of 2005. Interestingly only Baden-Württemberg, the state that reported some of the worst success figures, has no sunset clause.

From these facts it can be argued that the demise of pre-trial conciliation is the product of mistakes made at the conception of the scheme. One of the main intentions of the federal government was to reduce court backlogs and speed up civil procedure for small claims disputes. Another purpose was to reduce the costs of the legal system and save money for the empty treasuries of German states. A comparison of legal costs and the timeliness of procedure in civil matters with common law countries, such as Australia, shows that German courts are supremely efficient and that the German civil law system is one of the cheapest in the world. Moreover legal expenses insurance is very common in Germany and many litigators are fully covered by their insurance premiums. According to Greger 67.6 per cent of all trials before Bavarian Magistrates' Courts (including those which are not covered by the conciliation scheme) are concluded within three months of the filing of the action and only 1.5 per cent of all trials take longer than 12 months.<sup>38</sup> It was also found that mandatory conciliation for small claims is not cheaper than a court trial. These figures prove that there is no real need to speed up the procedure or to reduce the costs of trial. On the contrary it is hard to conceive a

cheaper or speedier dispute management system than that provided by German Magistrates' Courts. Mandatory conciliation could never fulfill such high ambitions, particularly as it has become evident that successful mediation takes time.

Another reason for failure can be seen in the half-hearted implementation of the schemes. As researchers in Australia have argued before, if the courts implement mediation schemes (mandatory or voluntary) they must also bear the burden of providing quality mediation services.<sup>39</sup> One way to ensure quality would be the use of court-employed and highly trained mediators. Other options include the regulation and monitoring of competency standards or engagement in long-term contracts with well-regarded mediation providers. There needs to be further research on which option is the most suitable for German small claims conciliation. Mediation by judges in different civil and administrative courts is currently explored in a pilot project in the state of Lower Saxony and has achieved considerable success there.<sup>40</sup>

Communities, bar associations and other conciliation providers have been left alone with the task of providing a network of conciliation services. No standards or codes of conduct were published and very little training was provided for practitioners and referral clerks. This lack of preparation for the task at hand also explains the significant difference in success rates when the German conciliation schemes are compared with other small claims mediation procedures in the US or Australia. The provision of quality services may also have helped to promote the use of ADR and mediation for civil disputes instead of questioning the usefulness of alternatives to adjudication.

### Success of community based mediation

'Surgery successful – patient dead!' is a German saying which illustrates the concept that even if a project is carried out properly it does not necessarily yield

the desired results. The mandatory conciliation schemes in Germany may not have succeeded when compared to the benchmarks set by the federal and state governments. Nonetheless the schemes have established a wide-spread network of conciliation providers that is accessible to millions of disputants. Schemes were not limited to a court district but operated state-wide. North Rhine-Westphalia alone has more than 17.7 million inhabitants. There are currently 1258 Schiedsämter (conciliation centres staffed by Schiedsleute) which provide conciliation

(Mediationsstelle Frankfurt/Oder) where volunteers receive a two-year training course in mediation and conflict resolution in exchange for providing mediation services on behalf of the centre to the wider public free of charge.<sup>41</sup> Projects like this may also be able to provide enough community-based mediation services to counter the slow emaciation of the Schiedsamt which seems to be otherwise unstoppable.

In areas where the Schiedsleute tradition never took hold, community mediation centres can over time establish a community presence in

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services in addition to the other registered providers. The reports also reveal that traditional dispute resolution providers, like the Schiedsleute in Germany, represent a powerful resource for community-based dispute resolution that all too often remains untapped. This argument is supported further by the success rate of the Schiedsleute which is the highest success rate for mandatory conciliation.

Findings from Germany also attest to the argument that legal education and training do not necessarily equip mediators with the skills necessary to do the job since laymen mediated better than most professional lawyers and even the notaries. One explanation for this may be that they allocate more time to the dispute resolution process since they are volunteers and do not have to run practices from their fees. Using (well-trained) volunteers for community-based mediation may be a way for governments to keep the cost of dispute resolution low and provide for quality services at the same time.

A German example for such a project is the Mediation Centre Frankfurt/Oder

dispute resolution and support already existing networks. There is promise in the presumption that even property disputes that had the lowest rate of success under the conciliation schemes can be mediated successfully if mediators are better trained and use facilitative and problem-solving techniques. This goes for mediators of all backgrounds, be it Schiedsleute, lawyers or notaries.

### Conclusion

Mandatory conciliation was a daring experiment for the German federal and state governments. For the first time in German history, s 15 of EGZPO provided for deliberate divergence of the laws of civil procedure in the German states. As it was envisaged, the states implemented different models for mandatory conciliation that ranged from community-based mediation by laymen to processes provided by legal professionals which more closely resemble neutral evaluation or settlement mediation. It has also become clear that the different models so far contain various severely inhibiting



flaws which can be traced back to the structure of s 15 of EGZPO. However, mandatory conciliation as a whole can almost be called a success when viewed through the glasses of a researcher and experimenter.

The road is now paved for a future general conciliation scheme which addresses the shortcomings of the three models. More importantly, the question as to what the benchmarks and purposes of such a scheme are in Germany can be further evaluated on the basis of the collected data. It has become obvious that speedier and less costly dispute resolution than is currently provided by the courts cannot be the purpose of small claims mediation in Germany. This places more emphasis on the other goals stated so far, namely peaceful conflict resolution and a more co-operative dispute culture. Whether these goals can be reached remains to be seen and data so far suggests that changes will take years, if not decades, to become measurable.

If such a culture change is the purpose of court-related mediation in Germany, then community based laymen schemes hold the greatest prospect of achieving these goals. Finally, the data gathered in Germany also contributes to the discussion about the value of mandatory or voluntary court-related mediation in that it shows that the participants' will to settle a dispute does not necessarily decrease with an order to mediate. As it has been argued before, most Western cultures at the moment do have a need for compulsory mediation to change the adversarial dispute culture that has evolved since the dawn of industrialisation. The availability of mediation services without the mandate to use them is often not enough to persuade disputants to try such ADR methods when they have been brought up with a dispute culture that promotes an adversarial attitude towards conflict and relies predominantly on legal specialists to argue and determine the dispute. ●

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## Endnotes

1. Röhl K F and Weiß M, *Evaluierung des nordrhein-westfälischen Ausführungsgesetzes zu s 15 a EGZPO*, Ruhr-Universität Bochum (2004), <[www.justiz.nrw.de/JM/justizpolitik/schwerpunkte/streitschl/zusammenfassung\\_gutachen.pdf](http://www.justiz.nrw.de/JM/justizpolitik/schwerpunkte/streitschl/zusammenfassung_gutachen.pdf)>.

2. Treuer W D and Hoffmann H, *Evaluation des Baden-Württembergischen Schlichtungsgesetzes*, Universität Konstanz, Institut für Rechtsstatsachenforschung, Praktikerforschungsgruppe beim Oberlandesgericht Stuttgart (2004), not available online.

3. Greger R, *Abschlussbericht zum Forschungsprojekt 'Außergerichtliche Streitbeilegung in Bayern'*, Friedrich-Alexander-Universität, Juristische Fakultät, Lehrstuhl für Bürgerliches Recht, Zivilprozessrecht und freiwillige Gerichtsbarkeit (2004), <[www2.justiz.bayern.de/daten/pdf/AbschlussberichtBaySchlG.pdf](http://www2.justiz.bayern.de/daten/pdf/AbschlussberichtBaySchlG.pdf)>.

4. Translation by the author.

5. See the official reasoning in German parliament at BT-Drucksache 14/980 (1999).

6. Above note 5 at 7; for more detailed figures see Röhl and Weiß, above note 1 at 157.

7. Röhl and Weiß, above note 1 at 31-2.

8. Above note 7.

9. Above note 7.

10. Alexander N M, *Mediation: ein Metamodell, 4 Perspektive Mediation 72* (2004) at 80; also compare Currie's description of traditionalist mediators in Currie C M, *Mediating off the Grid*, 59 (2) *Dispute Resolution Journal* 8 (2004).

11. Röhl and Weiß, above note 1 at 175.

12. Under German law notaries are public officials who serve as witnesses of facts transacted by parties, such as the conclusion of contracts over immovable property or the formation of companies. They also certify the authenticity of documents and serve as impartial legal advisors to parties.

13. See the four different styles of mediation differentiated by Boulle: settlement mediation, facilitative mediation, therapeutic mediation and evaluative mediation in Boulle L,

*Mediation: principles, process, practice* (1996), at 29-30.

14. Rüssel U in Haft F and von Schlieffen K, *Handbuch Mediation* (2002), 858-89, at 864.

15. Treuer and Hoffmann, above note 2 at 80.

16. Above note 15 at 167.

17. Above note 15 at 168.

18. See for example Charlton R and Dewdney M S, *The mediator's handbook: skills and strategies for practitioners* (2004) at 6. Charlton and Dewdney mediate according to a facilitative model and state that advancing to solutions too early in a mediation carries the danger of locking the parties into their opening positions at an early stage before necessary understanding for an opposing position can be created.

19. Treuer and Hoffmann, above note 2 at 170.

20. Mack K, Australian Institute of Judicial Administration and National Alternative Dispute Resolution Advisory Council (Australia), *Court referral to ADR: criteria and research* (2003) at 19.

21. Röhl and Weiß, above note 1 at 1-2.

22. Above note 1 at 2; Greger, above note 3 at 70; Treuer and Hoffmann, above note 2 at 189.

23. See for example Röhl and Weiß, above note 1 at 3.

24. Above note 1 at 3.

25. Above note 1 at 306.

26. Above note 2 at 164.

27. Above note 3 at 33.

28. Above note 3 at 35.

29. Above note 3 at 47.

30. Above note 3 at 51.

31. Above note 1 at 276.

32. Above note 1 at 7.

33. Above note 1 at 6.

34. Above note 2 at 118.

35. Above note 1 at 8.

36. Above note 2 at 182.

37. Above note 2 at 9.

38. Above note 3 at 53.

39. Astor H and AIJA Administration, *Quality in court connected mediation programs: an issues paper* (2001) at 14.

40. For more information see <[www.mediation-in-niedersachsen.de](http://www.mediation-in-niedersachsen.de)>.

41. For further information see <[www.mediationsstelle-ffo.de/](http://www.mediationsstelle-ffo.de/)>.