In-court Mediation in Germany

I. Admissibility and position of in-court mediation in Germany

In-court mediation has been practised in some German courts from 2002 onwards, with great - and still growing – success. People who come to court - parties, attorneys and judges - feel that mediation creates opportunities for alternative dispute solutions with wider options than the regular procedure can offer. Now in Germany more than 300 judges in 12 states and 16 of 26 districts of the courts of appeal are engaged in the in-court-Mediation.

Despite the success, it must be recognised that in-court mediation is not yet regulated explicitly under German civil procedure legislation. Nevertheless it is allowable, because it fulfils the legislative intent to settle the lawsuit. The German civil-procedure Act (§ 278 ZPO) calls on the judge to settle the case at any stage. It also includes the possibility of asking another judge, who does not have jurisdiction, to do this. The judge might also propose to refer the case to a person outside the court in order to come to an agreement.

Therefore – even without explicit regulation – in-court mediation is allowable in German civil-procedure.

II. Organisational implementation in regular civil action

The organisational integration of mediation in civil procedure normally proceeds in this way:
Once the lawsuit comes to court it takes its usual course to the judge who has jurisdiction. This judge notifies the defendant of the proceedings and informs both parties of the possibility of in-court mediation. The judge sends the file to the mediator who also works as a judge in the court, but who will not have jurisdiction in cases in which he acts as mediator. The mediator then asks the parties if they wish to accept mediation for their dispute.
If the parties accept, the mediator invites them to the mediation meeting, which takes place in special rooms at the court.

If the parties are able to reach agreement in mediation, the agreement will be recorded by the mediator - in his function as a “requested judge”. The settlement can then be executed as if it were a judgement.

If the parties do not come to an agreement in mediation, the file is transferred back to the original judge who then continues in the ordinary civil procedure and makes a judgement.

III. Different models of implementation

At the moment there are three different models of in-court-mediation:

1. Integration model

The ordinary and most widespread model is the integration model. In this system the mediator is a judge in the court where the action has been brought. The internal distribution plan of the court guarantees that the mediator will not have jurisdiction in a case in which he has acted as mediator.

2. Extension model

In this model, two or more courts co-operate with the mediation. In contrast to the integration model, the judge who acts as mediator does not sit in the court where the action has been brought. The case is simply transferred to the co-operating court, where one of the judges undertakes the mediation.

This model is necessary for small courts with only a few judges, where otherwise it could not be guaranteed that he mediator would not have jurisdiction as judge. The model has been in use in three small courts in the district of Braunschweig since the end of 2006 and it seems to function quite well.

3. Outsourcing

In the first two systems only judges work as mediators, whereas the third model uses outsourcing by involving lawyers as mediators. The model was introduced as a pilot project in one of the courts in the district of Braunschweig. It functions as follows:

After the claim has come to court, the parties are offered a choice between a judge and a lawyer for the mediation session.

If the parties choose the lawyer, he is allowed to use rooms in the court. During the pilot project the parties do not have to pay for the lawyer because the official lawyers' organisation in our district ("Rechtsanwaltskammer") provides a fee.

The concept is absolutely new, it has only been introduced as a pilot project since February 2007. The model might increase acceptance of alternative dispute resolution, which offers so many advantages.

IV. Progress and atmosphere of the mediation session

1. Introduction

The easiest way to explain our special form of mediation would be for you to imagine that you are in the city of Braunschweig, taking part in a mediation concerning a construction dispute, that I mediated some time ago.

Please imagine the following scenario:
You come to the county court in a room with decorative plants and nice paintings. In the middle of the room there is a round table. At this table, eight to twelve individuals can be comfortably seated. The judge mediator welcomes everybody with a handshake and offers them a seat. Then drinks and biscuits are served. After a short introduction about the characteristics of In-court-mediation, the discussion can start.

First of all, the parties to the dispute identify their special aims for the mediation.

On one side there is the claimant, a professional owner of a building, a big company that constructed an office building with total construction costs of 2 million €. The claimant wants the defendant, the main contractor, to pay back 200.000 €, supposed replacement costs, due to several structural defects. The claimant puts forward more than 100 instances of structural defects of varying extent. The claimant demands a payment of 200.000 € from the defendant, net of a smaller amount to be agreed in the negotiations.

The defending main contractor demands from the claimant a payment of 130.000 € as compensation due to him under a counter claim. He is also willing to accept a small reduction of the amount.

Furthermore, there are 3 subcontractors at the table. The defendant took legal action against the subcontractors as he considers them responsible for the structural defects, although the defendant contests the claimant’s claims for these defects.

The subcontractors do not want to pay anything, nor do they want to repair the defects, since in their opinion – what a surprise - there are no defects in their work. At most, they consider that some minor repairs – without accepting the claim – might be possible. The mediator writes down the identifed aims in keywords on 2 flip-charts.

The setting is a round table with the parties, the mediator, the managing directors for the claimant and the defendant and the three subcontractors, each with their lawyers, eleven persons in total.

Later on, the parties estimate with the assistance of the mediator the presumed time-scale for litigating the case without mediation, by means of the two lawsuits that would be considered necessary and a further three year period, the risk of incurring costs for the proceedings – including the costs for a sworn expert and witnesses – amounting to approximately 55.000 to 60.000 €.

In response to the mediator's question, how would it be possible to approach the differing positions, the claimant considers that it would be necessary to dispose of over 100 structural defects one by one. First of all, the claimant objects that the heating system is too large and therefore too expensive. In response to the mediator's question, how high the amount should be, the claimant named 2000 €. The defendant and the subcontractor involved disagree strongly. They consider that the maximum additional amount should be 1.000 €. After this, the mediator asked why this defect is so important for the parties. In relation to the total claim it amounts to only 1.5%. Each party then agree that this issue was not so important. With everybody's consent the mediator crosses out this issue on the flipchart. The same procedure is repeated concerning the subsequent five issues. The parties realise that no solution can be reached in the time available. The mediator requests the claimants to name the ten most important defects. After a short period of consideration, they name not even ten but only seven major defects. There are however different opinions between the parties with regard to the existence of these defects. This approach does not seem to be workable. The mediator suggests a short break and separate negotiations in two different rooms. The claimants agree with separate negotiations, accompanied by the mediator.

These separate negotiations offer the possibility to gain a realistic view as to each party's chances and risks of further proceeding, without weakening their own position or risking loss of face because of too rapid acceptance of a specific result. In these negotiations it is possible to speak very openly without strengthening the other party's position.

In the conversation with the defendant's side it becomes clear that there is definitely an understanding of not having worked without mistakes. The defendant´s previous managing director is annoyed about a comment by the claimant´s managing director. The claimant´s managing director expresses his regret to the mediator about the unfortunate comment he

made. After the mediator has conveyed this regret, the defendant makes a concession. As a positive consequence the defendant's side is prepared to be more co-operative.

After half an hour of separate negotiations there are several offers for a general solution and a compromise. Now the negotiations can continue with both parties together. After a short discussion the following solution is developed, to which each of the participants agrees:

1. The claimant to pay the defendant compensation of 50.000 € for the remaining wage demands of the works, within one month.

2. The defendant commits himself to repair the named seven structural defects within six months. These works to be done by the subcontractor concerned. The defendant undertakes to pay 25 % of the costs of these works.

3. The works to be inspected by an officially sworn expert whom the parties have chosen in the negotiations. The costs of this final inspection to be paid by the claimant if the expert declares the works as free of defects. Should he declare that there are some remaining defects, the costs of the final inspection are to be paid by the defendant. In this case, the defendant commits himself to pay the amount of money estimated by the experts as repair costs, within one month.

4. The defendant to receive from the claimant a further major order with total construction costs of 1 Million €.

5. The costs of the lawsuit and of the comparison to be struck out.

With this solution the conflict parties have not only saved three further years of litigation but also considerable costs. Instead of paying possibly 60.000 € for the expense of a lawsuit, they have to pay only approx.11.000 € for the costs of proceedings. It is a solution with winners on each side. A further cooperation is possible and planned for one big order. All participants are content with this agreement, which would not have been possible in legal proceedings with the claims and counterclaims of the parties.

2. What are the advantages of in court-mediation?

a) A fast procedure

Mediation offers the possibility of reaching a joint solution very fast, in accordance with the interests of the disputants. Mediation taking place within a short period of time offers a

thoroughly worked out solution covering all controversial points. It is possible to avoid protracted court proceedings with several hearings.

In an in-court mediation it is possible to reach a final solution within a period of four or six weeks, with negotiations each lasting up to two hours.

This is very interesting for the lawyers. They save time spent on exchanges of letters and meetings with the disputants. Nevertheless they can still earn all the fees that they can earn in normal proceedings.

It is possible to solve a case with hundreds of details within only two or three hours. But it is necessary for the disputants to really want to come to an agreement in order to solve the five main defects and furthermore be willing to come to a generous compromise.

On the other hand, legal proceedings can be continued at any time without loss of time.

b) no additional costs

There are no additional costs for mediation. It is a free offer from the court. If the legal proceedings come to an end through our in-court-mediation, the claimant's side will recover two-thirds of the legal fees, which in Germany have to be paid in advance.

In addition, there are no extra lawyer fees.

c) A wider range of solutions, more participants

In mediation the parties are able to create a very flexible solution that meets their specific interests. It is possible to develop a wide range of solutions. In this process the parties are not limited to procedural matters. It is the parties´ responsibility to choose the topics on which they want to negotiate.

Furthermore, it is possible in mediation to involve other persons who are not parties to the legal proceedings, but who are important for the solution of the conflict.

For example, there is a conflict between two brothers. The real reason for this conflict was that they had not received equal treatment from their mother. The mother, although she was not involved in the legal proceedings, came to the mediation and a general solution between the brothers and their mother was found.

Or there may be a claim against a lawyer, architect, doctor or engineer because of defective work. In most of these cases there is a professional indemnity insurer in the background, who is the actual but not formal defendant. In these cases it is necessary to bring the insurer to the negotiating table, if a solution is to be found.

d) More flexibility in the solutions

Everybody knows that sometimes parties get stones instead of bread, as a result of a court judgement. Such a judgement is not helpful for the parties and cannot resolve the conflict. It only solves that part of the conflict that is legally available.

Often this is a kind of pyrrhic victory. There is a successful claim for payment but the defendant is insolvent. The claimant gets a nice paper with a judgement for a large amount of money, but no money in reality. In most mediation cases the debtor is willing to make all efforts to get the money from a third-party debtor to whom the creditor had no access, even beyond the limits of attachment. The debtor is prepared to do this, if he can get a new position through a partial release from the debt. It also helps the creditor, as he can collect some of his outstanding accounts at least.

Sometimes the parties develop solutions that nobody expects. An architect is very angry with his client because of his narrow-mindedness. He says that he could do without the very small fee that would not nearly correspond to the work undertaken. He suggests that the money could be donated to a charitable organisation, which he could name. The client, a big insurance company in the city of Braunschweig, agreed to this solution. In the end everybody was satisfied.

In 99 % of the cases money is the central issue. This occurs especially in family and marital conflicts. But generous solutions are possible if things are checked with the other side, which are legally elusive. I have often seen that people can be generous when the other party admits the mistakes they have made and even apologise.

From my point of view, participants are looking for constructive solutions, because they want to come to an agreement. Most people do not want to take disputes to court. In most cases there is a remarkable interest in finding a solution that creates peace or offers a way of ending the relationship by agreement.

e) Non public negotiation, the mediator is not the judge responsible for the case

A further advantage of mediation is that the negotiation is conducted in private with a judge mediator who is not responsible for the case. It is possible to leave mediation without incurring disadvantage in subsequent legal proceeding. In most cases the parties´ aims and interests are closer than they believed. But communication breaks down following the exchange of the first lawyer's letter. Fearing disadvantages in the adversarial proceedings there is no possibility of moving back. In mediation it is always possible to take a step back, if someone realizes that he/she went too far in the negotiations, more than they intended to do. This step back is harmless, because the responsible judge will never be notified of it.

In private separate negotiations the weaknesses of a party's position can be discussed and a very big step forwards is possible, without loss of face.

3. What is the experience of mediation in the city of Braunschweig?

I have conducted more than 400 mediations and I would say that there are no cases that are unsuitable for mediation.

In more than 90 % of the mediations that I have conducted an agreement was found. This year I had a success rate of 99 %. The other mediators in Braunschweig achieved 98 % this year.

The disputants want to come to an agreement. Even deep personal disagreements between parties are not a handicap. For example, an agreement was possible between a sister, a brother and her mother, although the sister, as the claimant, had accused her brother and mother of faking the father's Will. As a result, criminal proceedings had been initiated.

Even legal matters that need specific knowledge of technical problems or the law can be managed. Very often there are matters in dispute that are not the subject of the current legal proceedings in our court, but are the subject of legal proceedings in other courts. In these cases it is possible to create a complete solution that also ends the legal proceedings in the other courts. My personal record was to finish ten proceedings, two from my court, one from the Court of Appeal, and seven from a local court.

Furthermore it is important that this success depends on the free will of the disputants to come to a fair agreement. People are able to make peace, if they feel respected with high regard for their personal interests.