

# The German Mediation Act Five Years On: the Perspective of Two Judge Mediators

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The German Mediation Act was passed five years ago on 21 July 2012, after nearly all EU member states were required by a 2008 EU Directive to implement mediation legislation. I took the opportunity to talk about the Act and its effects with two experienced mediator-judges working in German courts. Anne-Ruth Moltmann-Willisch has been a judge for 33 years and a mediator for 11, and is presently at the Landgericht Berlin. She coordinates the court mediation programme for Berlin's civil courts. Pia Mahlstedt has been a judge for 18 years and mediator for 9, and works today at the Amtsgericht Brandenburg. Both are pioneers of mediation in Germany, who were involved in coordinating pilot court mediation programmes that preceded the German Mediation Act.

**Greg Bond:** What significant changes has the new law brought about?



**Anne-Ruth Moltmann-Willisch:** Courts were offering mediation before the law, in pilot projects that began in the federal states between 2003 and 2008. Judges were trained to mediate. The new law requires all courts to set up mediation programmes with so-called *Güterichter* - conciliation or mediator judges. These are judges trained as mediators who mediate cases referred to them by other judges. In practice, however, not much has changed, I do not think that the law itself has led to more mediation. Since I conducted this interview an independent report evaluating the Mediation Act commissioned by the Ministry of Justice has been published. Its sobering findings show that the law has done nothing to promote mediation and that mediation in Germany is still very much in the doldrums.

**Pia Mahlstedt:** What we now have is a legal basis for mediation in German courts. Since 2002, the German civil procedure rules have required judges to offer the parties the opportunity to settle before judgment in what is called a *Güteverhandlung* (conciliation hearing), which is conducted by the same judge who will hear and adjudicate the case. Now judges can refer cases to a second *Güterichter* or conciliation or mediator judge. It is unfortunate that the terminology overlaps and confuses people. A *Güterichter* acts as a mediator with no decision-making powers. Having a legal basis for this is useful.



**Anne-Ruth Moltmann-Willisch:** The procedure for court mediations is not regulated in any great detail, and there is a lot of flexibility in how and how much is mediated across the different German federal states. In Berlin we mediate in all kinds of civil claims.

**Greg Bond:** I often hear sceptical views around the world about appointing judges as mediators. Can judges really step out of their roles as adjudicators? Do the parties not expect judges to decide for them? How do you view this question in your own practice, and more generally in the *Güterichter* system around the country?

**Pia Mahlstedt:** When I work as a mediator - or *Güterichter* - I do not read the case files in advance. I explain my role to the parties and their counsel at the beginning of the mediation and I take a strictly non-evaluative approach. I allow the lawyers to have their say on the legal matters, and they often explain why they will win the case. Then I steer the mediation session away from the law. I have interviewed a number of *Güterichter* about their practice, and some take a more evaluative approach, as in the *Güteverhandlung*, but I do not see a serious problem in having different mediation styles within the courts.

**Anne-Ruth Moltmann-Willisch:** I do read the file, but without making any kind of legal assessment. In Berlin, court mediator-judges have agreed not to offer any legal evaluation during their mediations. At first, I found this change of roles difficult, but now I have no problems with this. Some judges train to be mediators and then they realize that they cannot skip between roles so easily. Training is important. In Berlin, it is done on the basis of a six-day programme and then observations of mediations, and practicing mediator-judges must attend six team mentoring meetings per year led by an external coach or psychologist.

**Greg Bond:** The Mediation Act also provided for courts to refer cases to external mediators, but this is hardly happening. Why not?

**Pia Mahlstedt:** Once the parties and their lawyers have taken the path into the courts, they are very reluctant to leave it.

**Anne-Ruth Moltmann-Willisch:** It is also hard to imagine judges recommending any specific external mediator. This is a weak spot in the law, and I do not really know how we can change this.

**Greg Bond:** Where would you like mediation in the German courts to be going over the next five years?

**Anne-Ruth Moltmann-Willisch:** I would like to see clearer procedural rules for mediations conducted by mediator judges. And I would like to see more involvement of external mediators, and more judges using the option of referring cases to mediation.

**Pia Mahlstedt:** I think the principle that mediation must be voluntary is important and right, and this is the case within the system as it now works. In some areas, however, we should consider whether trying mediation should not be mandatory. I am thinking particularly of family matters where children's futures are involved and of disputes between neighbours. There is so much at stake here that is not related to the law, and that a court hearing cannot deal with.

**Greg Bond:** Why did you both become so involved in mediation in the courts?

**Pia Mahlstedt:** It began ten years ago. I was not entirely satisfied with my work as a judge. Mediation was an alternative that made it possible to work with the disputants and address the background to their conflict. This fascinated me and for a while I even thought that mediation was a potential solution for all conflicts. Today I can see roles for and satisfaction in both sides of my work - as a judge and as a mediator. I am often still very happy when as a mediator I am able to support people in conflict in ways that I cannot when working as a judge.

**Anne-Ruth Moltmann-Willisch:** It is simply good to see that mediation works, when a case that has been ongoing for ten years can be settled in mediation and the parties and their counsel are grateful for this, or when unnecessary costs and pain can be avoided. I am passionate about mediation, and my passion increases when I see parties who began the process very sceptically reaching agreement. A mediator has to be passionate and persistent.