Kluwer Mediation Blog

Who Should Be Promoting Mediation and Why? Mediation in Germany: The Poor Cousin to the Courts?

Greg Bond (Bond & Bond Mediation / University of Wildau) · Thursday, November 24th, 2016

There was a prominent mediation case that hit the headlines in Germany in October and November this year. The mediator was none other than former head of government, ex-Chancellor and former Social Democratic Party leader Gerhard Schröder. The present leader of the Social Democratic Party, Sigmar Gabriel, is minister for the economy and had given ministerial permission for the supermarket chain Edeka to buy its ailing competitor Kaiser's-Tengelmann in its entirety, thus overruling a decision by the Federal Cartel Office. Another competitor, Rewe, filed a claim against Gabriel's use of his ministerial powers. The mediation resulted in Rewe dropping its claim, and Edeka and Rewe agreeing to share the purchase of Kaiser's-Tengelmann, with the prices of the various markets being determined by an independent auditor. Further details remain confidential. Gabriel was able to announce that 15,000 jobs had been saved.

A good day for mediation? Yes, for sure. This civil suit was dropped, and mediation was a successful alternative. Here in Germany, this is very much an exception. Mediation is used in civil claims in only a tiny fraction of cases. Before I explain why, some terminology is required.
That terminology is confusing – the Schröder mediation was called a *Schlichtung*, or conciliation, as is nearly always the case when mediation becomes headline news. When it comes to civil procedure, Germany found its own way to implement the EU Mediation Directive into national law, inter alia by devising a mediation procedure with its own special name and thus another term for mediation: *Güterichter* procedure. A *Güterichter* or "conciliation judge" is a judge in office who can act as a mediator in a civil claim. The judge presiding over the procedure can refer the parties to a *Güterichter* – another judge within the court, and he or she can mediate if the parties agree.

This procedure was introduced in 2012 and Professor Reinhard Greger has just published a first study of its use. The results are sobering: in courts across the land only a miniscule number of cases go to *Güterichter* – in many courts only a small fraction of 1 percent. Of those few that do go to *Güterichter*, on average around 60 percent settle. *Güterrichter* procedure is free of charge for the parties and simply administered, but it is not being used. The courts also have the power to recommend external mediation, and, although there are no figures, the number of cases here will be lower still. Some potential civil disputes will be mediated before claims are filed, but not many. Recently I was called up by a lawyer friend of mine who works in Munich and trained to be a mediator with me some years ago. He was frustrated by the lack of mediation opportunities in his work and concerned at the levels of escalation in the disputes he deals with. How could he change this?

The German courts are accessible and efficient. There is legal aid for those who need it. Rarely does any ordinary case wait years to be heard. The number of civil claims is decreasing. There are no horror stories of the kind we hear from some jurisdictions about massive case backlogs or financial barriers keeping people away from the courts. German judges are required by procedure to invite the parties to consider settlement anyway in many instances. Such is the picture many would paint. Under these circumstances, why should mediation be needed at all?

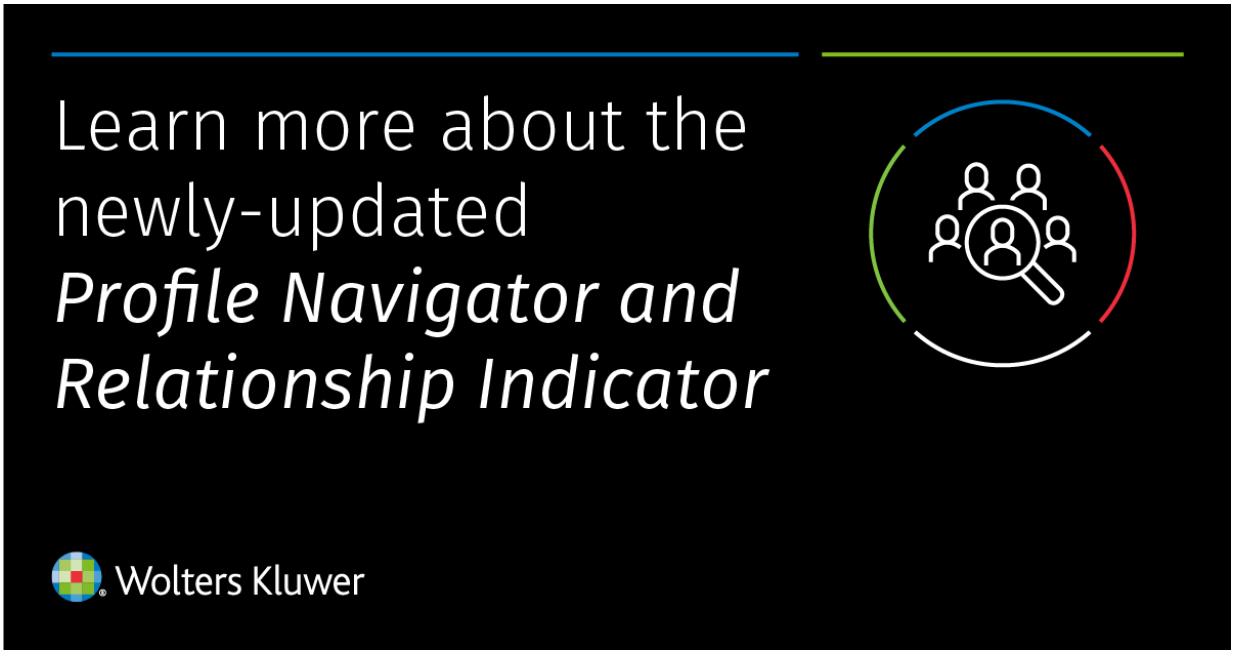
The point I want to make is this: if mediation is just an alternative dispute resolution service that works when the courts cannot do the job they are supposed to be doing, then something is wrong. Mediation then becomes the cheap and quick settlement alternative to keep cases out of court – and the parties have no alternative but to mediate. It even ceases to be an alternative of choice. But shouldn't it be the intrinsic quality of the mediation process and the quality of the results that make mediation attractive, not the poor quality or cost of the courts?

The German mediation market is outside the courts, in conflicts where civil litigation is usually not yet an option – in workplaces and organisations, in conflict management systems, in youth and social work, in team building, community work, or public planning. Here it is the quality of the process that matters – mediation as a better way of communicating in conflictual situations.

The message as to the quality of mediation has not got to the German courts, but should we be blaming the legal profession? If a judge is faced with parties litigating, why should he or she refer them to mediation? They are seen to have got so far for good reason. If a lawyer takes on a case, why should he or she recommend mediation, and see the case settled more quickly by someone else, and his or her own income from that case fall? That lawyer would have to be a believer, and would have to convert his clients too.

Should we be blaming the legislators? They could have done a better job of promoting mediation and creating mediation-friendly frameworks when the 2008 EU Directive made a mediation law a necessity. Instead they took a soft approach that has not changed much in the use of mediation in Germany.

Should the responsibility be with all the trained mediators out there? Complaining does not help. We need to promote mediation for what it is – a way to work through conflict that makes sense even if the courts work well. As the supermarket chains have just discovered.



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