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Your Good Faith Counts – Conciliation Applications in Germany

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Conciliation is attracting more and more users for its prided features as an easily accessible, cost- and time-effective procedure for dispute resolution. It is supported and also evidenced in the recent effort put into the discussion by UNCITRAL Working Group II to establish new instruments – a convention and a model law – with regard to the recognition and enforcement of international commercial settlement agreements resulting from conciliation (see A/CN.9/WG.II/WP.200). Incidentally, in many jurisdictions conciliation is a prerequisite 'statutory' dispute resolution mechanism for small value claims or certain types of disputes. But also, certain high volume international commercial claims, construction disputes for example, seek conciliation for its celebrated facets.

There are notable German court cases that have dealt with the question of whether the application for conciliation has been adequately filed and which have clarified the requirements of an application for conciliation. The relevant provision is Section 204(1)[4] of the German Civil Code ("*Bürgerliches Gesetzbuch*"; "BGB") which recognizes conciliation as one of the causes for the suspension of the limitation period.

Suspension of the Limitation Period upon Conciliation

Provided that an application for conciliation is filed either with a conciliation authority established or recognized by a State or with any other dispute resolution body chosen with the parties' mutual agreement, the limitation period for the underlying claim will be suspended according to German law when the notification of the application to the other party is arranged ("*veranlassen*"). However, if such notice is made shortly (or is arranged for shortly, pursuant to the travaux préparatoires; see BT-Drs. 14/7052 at page 181) after the application was filed, suspension will take place at the moment when the application is filed, if the application was complete. It is obvious that the limitation period will not be suspended upon the filing of the application if the notice is not given to the other party due to faults attributable to the applicant (i.e. lacking essential information or documents in its application, etc). However, if the delay in notice is caused by the conciliation authority for any internal administrative failure, the suspension should nevertheless take place already from the date of the application.

Apart from the potential intricacies in pinpointing the commencement of the suspension of the limitation period, what makes a conciliation application complete and effective in view of giving

the effect of suspension may still need to be delved into. Below are a few pointers learned from the recent court cases.

Claims Being Sufficiently Concretized

In view of reaching a settlement, the parties may be incentivized to not specify the claims or amounts sought in the conciliation proceedings. Thus it is often the case, especially when the value in dispute is low, that claims are quite vaguely put forward and the applications do not diligently describe a life situation (factual circumstances) that gives rise to such claims.

While it is not necessarily required to calculate and stipulate a particular amount of damages, poorly specified claims will not result in the suspension of the limitation period. For instance, in a recent case (20. Aug 2015, III ZR 373/14) where damages were claimed for erroneous investment advice, the Supreme Court stated that an application for conciliation should concretize the precise investment and the amount invested, provide a brief overview of the problematic investment advice and the (approximate) period of time when it was given. It is no news that claims should be sufficiently concretized; however, a persistent number of decisions of the Supreme Court show that preparing the application to satisfy this requirement may not be as clear and easy as assumed at the outset.

Delay in Notice by Conciliation Authority

Bearing Section 204(1)[4] BGB in mind, what if, for instance, the notice by the conciliation authority was given to the respondent only ten months after the expiry of the limitation period (thus simultaneously, more than ten months after the submission of the application)? Such delay in making the notice seems unreasonable and obviously not within the meaning of the “shortly” timeframe as required under Section 204(1)[4]. While the administrative delay on account of the conciliation authority should not disadvantage the applicant with respect to the calculation of suspension, the inside story of this recent case of Higher Regional Court in Celle (24 Sept 2015, 11 U 89/14) might somewhat weaken such a view.

The particulars here were that the applicant made over 12,000 filings of a similar nature; the applications were filed at the last minute (about a month before the expiry of the limitation period); the conciliation authority consisted of only a single person; other conciliation bodies were available; and the applicant was aware of all the aforementioned facts at the time of its application. For these reasons, the court did not sympathize with the applicant and thus refused to acknowledge that the date of application was the date relevant for suspension of the limitation period. The limitation period was not suspended on the date of the application; hence, the claim was found to be time-barred.

Willingness to Conciliate

Another case rendered in 2015 by the German Supreme Court (28 Oct 2015, IV ZR 526/14) also shows that the good faith principle is to be taken into account in deciding on a rightful application for conciliation in view of the suspension of the limitation period.

The court acknowledged the long-standing jurisprudence that an application for conciliation for the sole purpose of suspending the limitation period is in itself legitimate and does not constitute an abuse of rights (see 6 July 1993, VI ZR 306/92). However, the applicant had no intention to participate in the conciliation proceedings it filed for, refused to enter into any settlement outside

the court and even informed the respondent of its half-hearted intention towards conciliation prior to the application. As such application for conciliation was found to constitute an abuse of rights, the applicant was denied the benefit of the suspension of the limitation period.

Closing

In short, an application for conciliation will fail to suspend the limitation period if it lacks the necessary indication of particular claims or a good faith intention to conciliate, such as when the application blatantly ignores the organizational capacity of the conciliation body. Filing a sufficient application for conciliation would be critical bearing in mind that the parties' dispute will likely be brought further to arbitration or court if conciliation fails. Especially when the lapse of the limitation period lurks on the horizon, the applicant would want to make sure that the filing of the conciliation application will undoubtedly trigger the suspension of the limitation period.

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