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Alternative dispute resolution in administrative matters

- Answers from the German Bundesverwaltungsgericht, Leipzig -

Introductory questions

1. How do you define alternative procedures? How do you distinguish them from jurisdictional procedures and arbitration procedures?

Alternative procedures are all settlement procedures and techniques that are not carried out by a state judge who is appointed by virtue of his office for hearing and deciding the particular case. A special alternative procedure is mediation as a voluntary and confidential procedure to regulate conflicts independently from the court. With the assistance of a neutral and impartial mediator the parties agree to exchange their different points of view, to put the issues of conflict on the table and to structure them. Mediation aims to develop alternative options in a discourse to find a common consensual and lasting solution; the mediator is only a promoter of this process.

2. Do alternative procedures such as those defined above exist in your country? If no alternative procedures exist in your country, do you plan to create such procedures? Can you articulate your current thinking in this domain?

Article 1 of the German Mediation Act of 21 July 2012 defines mediation as a confidential and structured process in which parties using one or more mediators voluntarily and responsibly seek for a settlement of their conflict. A mediator is an independent and neutral non-executive who leads the parties through the mediation. In practice mediation is primarily found in civil matters, such as family, labour and business cases.

The “Güterichter” (judicial arbitrator) was added to the Code of Civil Procedure (Article 278 para 5 ZPO) by the "Law on the promotion of mediation and other methods of alternative dispute resolution" of 21 July 2012. He or she is a judge of the court but not a member of the competent chamber to decide the case. He or she has no authority as a decision maker to give a judgment but may use all the methods of conflict resolution including mediation. The competent chamber for the decision of the case, after having heard the parties, may refer the matter to a “Güterichter” (judge as a judicial arbitrator), if it deems an agreement possible. The trial then is suspended for the time while the “Güterichter” (judicial arbitrator) tries to develop a settlement together with the parties.

I. The goals and the scope of alternative procedures

1. With what objectives are these procedures deployed? What advantages and benefits are expected to result from them?

The activities of a “Güterichter” as a judicial arbitrator aim to develop alternatives and options in a discourse to find a common consensual and sustainable and long-term solution. The aim is not a contested decision, but an agreement; its scale is not the law but the balance of mutual interests.

2. Are alternative procedures used in your country in administrative matters? Since when? What factors contributed to their development and what is the proportion of administrative disputes that are resolved each year by such procedures?

2.1 If you include the obligatory preliminary administrative recourse (“Widerspruchsverfahren” - preliminary proceedings), Article 68 of the German Code of Administrative Court procedure stipulates that prior to lodging a rescissory action or a writ of mandamus, the lawfulness and expedience of the administrative act shall be reviewed in preliminary proceedings. The preliminary proceedings shall begin on the lodging of the objection to the authority within one month after the administrative act has been announced to the aggrieved party. If the authority considers the objection to be well-founded, it shall remedy it. If the authority does not remedy the objection, a ruling on the objection shall be issued by a higher authority. The preliminary rulings have always been stipulated, but they are limited on a control on legality and expedience.

2.2 As already mentioned the “Güterichter” (judicial arbitrator) was added to the Code of Civil Procedure (Article 278 para 5 of the German Code of Civil Procedure) by the "Law on the promotion of mediation and other methods of alternative dispute resolution" of 21 July 2012. This provision is applicable also in administrative cases before administrative courts at all levels (§ 173 para 1 of the German Code of administrative Court procedure). In practice this instrument is used by administrative courts in cases which are characterized by permanent relations between the parties including matters of civil service, subsidy and social assistance law. It is also useful in covert neighbourhood conflicts between the petitioner and the third party in public building or environmental cases.

3. Do rules restricting recourse to alternative procedures in administrative matters exist in your country? In your opinion, what are the types of litigation for which these procedures would not be appropriate?

There are no legal limitations concerning the recourse to alternative procedures.

4. Do instruments organising the use of administrative [*meant: alternative*] **procedures in administrative matters exist in your country? If so, are these instruments legally binding (hard law/soft law)?**

As preliminary proceedings are included (see above 2.1); these provisions are binding. Concerning mediation or the application of a “Güterichter” (judicial arbitrator), the law only opens up the possibility to use these alternative procedures. Statute law does not contain further provisions to maintain a maximum of flexibility for the alternative procedure.

5. If your State is a member of the European Union, how was the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters transposed into national law? ***Caution! This question is only asked insofar as the said directive can weigh on "administrative" matters in accordance with your domestic law.***

In Germany the directive 2008/52/EC on certain aspects of mediation in civil and commercial matters is not applicable in administrative matters.

II. The Stakeholders in alternative procedures

1. What categories of natural or legal persons have recourse to alternative procedures? Can all legal persons governed by public law use them?

All natural and legal persons may use alternative procedures; there are no restrictions.

2. Can the parties to an administrative dispute entrust the conducting of a mutual agreement procedure to a third party? What role is this third party called upon to fulfil?

Article 278a of the German Code of Civil Procedure stipulates that the court may suggest mediation or another method of extrajudicial conflict settlement to the parties. If the parties decide to conduct a mediation or any another method of extrajudicial conflict settlement, the court shall order the suspension of the proceedings. These provisions are applicable also in administrative cases before administrative courts at all levels (Article 173 para 1 of the German Code of administrative Court procedure). During the extrajudicial mediation procedure the trial is suspended.

3. Do standards regulating the activity of these third parties exist in your country (required qualifications, continuing vocational training, remuneration, deontology etc.)? Do authorities with responsibility for the supervision of compliance with these standards exist (public bodies, professional organisations, non-profit organisations - possibly operating under license, etc ...)?

Article 5 of the German Mediation Act obligates the mediator to ensure on its own responsibility that he has the theoretical knowledge and practical experience in order to lead the parties in a knowledgeable manner through the mediation by providing adequate training and regular refresher courses. Appropriate training should in particular provide knowledge of the basics of mediation, its process and its conditions, the negotiation and communication techniques, an adequate level of conflict competence, knowledge of the rules of mediation and the role of law in mediation and practical exercises, role playing and supervision. As a certified mediator may only be designated who has completed a training as a mediator, which fulfils these conditions. The certified mediator has to improve his skills following the mentioned standards.

4. Can the administrative courts invite or oblige parties to litigation brought before them to pursue an alternative procedure? Can the administrative court entrust a mediation mission to a third party?

Courts can only recommend a judicial or extrajudicial mediation, but they cannot force the parties to do so.

5. Can the administrative court itself conduct mediation proceedings? In your opinion, what are the advantages and drawbacks of a mutual agreement procedure conducted by a judge? In what types litigation does the direct intervention of a judge appear most appropriate?

See above under II 2. and 4. The “Güterichter” (judicial arbitrator) is a judge of the court but not a member of the competent chamber to give a judgment in the particular case. He or she has no authority as a decision maker but may use all the methods of conflict resolution including mediation.

As already mentioned above, in practice this instrument is used by administrative courts in cases which are characterized by permanent relations between the parties including matters of civil servants, subsidy and social assistance law. It is also useful in covert neighbourhood conflicts between the petitioner and the third party in public building or environmental cases. In permanent relationships, the parties have to get along also in the future, they cannot avoid each other. Then, a settlement may be more useful for them than a judgment with a winner and a loser.

III. The procedures of alternative procedures

1. Can you detail the different alternative procedures applicable in administrative matters in your country? How do the parties choose between the various alternative procedures available?

In Germany we differentiate between “mediation” as an extrajudicial procedure attended by an independent and neutral non-executive mediator and the activities of a judicial “Güterichter” (a judge as judicial arbitrator) in a pending court case. The parties are free to choose between these various alternative procedures. In a pending case they usually prefer to address the “Güterichter” (judicial arbitrator).

2. Do administrative appeals, mandatory prior to referral to the administrative court, exist in your country? Do optional such appeals exist? How are they organised? Does the lodging of an administrative appeal modify the conditions governing the filing and review of subsequent recourse to the court? For example, can the parties present arguments, not produced during a prior administrative appeal, before the administrative court?

As mentioned above (I 2.1), Article 68 of the German Code of administrative Court procedure stipulates that prior to lodging a rescissory action or a writ of mandamus, the lawfulness and expedience of the administrative act shall be reviewed in preliminary proceedings. They shall begin on the lodging of the objection to the authority within one month after the administrative act has been announced to the aggrieved party. If the authority considers the objection to be well-founded, it shall remedy it. If the authority does not remedy the objection, a ruling on the objection shall be issued by a higher authority. If the claimant lodges an action without having first lodged an objection with the authority, his petition will be dismissed as inadmissible by the court. The applicant may also claim issues before the court, which he has not yet presented to motivate his objection in the preliminary ruling; he is not precluded with these issues.

3. What are the general principles regulating alternative procedures (adversarial principle, impartiality, rules of confidentiality, time limits, etc ...)? How much autonomy do parties have with regard to the organisation of the deployment of an alternative procedure?

Article 1 of the German Mediation Act defines mediation as a confidential and structured process in which parties using one or more mediators voluntarily and responsibly seek for a settlement of their conflict. A mediator is an independent and neutral non-executive who leads the parties through the mediation. He is obliged to maintain confidentiality. The same applies for the “Güterichter” (judicial arbitrator) in a pending court case. The rest is up to the parties and the mediator resp. the “Güterichter”.

4. Does the initiation of an alternative procedure allow the suspension or interruption of periods of limitation? And of time limits for judicial appeals?

Article 203 of the German Civil Code as a substantive provision stipulates that the statute of limitations is suspended, if the debtor and the creditor are in negotiation about the claim or the circumstances giving rise to the claim until one party refuses to continue the negotiations. This provision is not applicable in public law. Time limits provided in the German Code of Administrative Court procedure are not suspended by negotiations of the parties.

5. Can the court intervene, even partially, during the course of an alternative procedure? If so, in what way?

The court cannot intervene during the course if an alternative procedure. The transition to an alternative procedure is a characteristic of the principle of disposition of the parties, esp. the petitioner. The trial is suspended during the alternative procedure.

IV. The efficacy of alternative procedures

1. Do you consider that alternative procedures are faster and/or less costly than court procedures? Can you provide a quantitative comparison?

Sorry; there are no statistical data.

2. What is the proportion of administrative disputes that are definitively resolved by alternative procedures? What are the factors in success, or failure?

Sorry; there are no data.

3. What is the legal standing of an agreement reached by means of an alternative procedure? Can such an agreement be referred to the administrative court for approval?

Article 278 para 6 of the German Code of Civil Procedure stipulates that a court settlement may also be concluded in the way that the parties submit to the court a written settlement proposal or accept a written settlement proposal by the court by pleading to the court. The Court notes the conclusion and the contents of a court settlement pursuant to sentence 1 by a decision. These provisions are applicable also in administrative cases before administrative courts at all levels (§ 173 para 1 of the German Code of Administrative Court procedure).

4. What instruments and procedures are available to the parties in the case of a violation of the agreement reached by means of an alternative procedure, potentially approved by the administrative court?

An extrajudicial settlement is a normal contract, which creates a substantive claim. That claim then must be enforced in a lawsuit, if it is not fulfilled by the party. In contrast to that a court settlement is an executory title comparable to a judgment. As an enforcement order it can be executed directly. Thus, an agreement between two parties which was mediated by a “Güterichter” may constitute an executory title if it is passed as a court settlement.

5. Do you consider it necessary to further develop alternative procedures in your country? Why? In what form?

In Germany the rules concerning alternative procedures on settlement of disputes are well developed. More detailed regulations would only restrict the necessary flexibility. In administrative matters in particular these alternative methods are not used so often, because the typical constellation of an administrative case is inappropriate to deploy alternative procedures. If appropriate, the court itself will work towards a settlement. Therefore there is no need to develop alternative procedures in particular for the administrative courts.

It should be noted, that in Germany mediation and mediative methods are increasingly being used preventively by the administration in planning procedures in order to avoid further litigation (e.g. communal zoning plans, infrastructural planning). Mediative techniques in the phase of the administrative procedure aim at a broad participation and intend to develop the fairest possible solution for everyone involved.