Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

№1, 2018

უნივერსიტეტის
გამომცემლობა

UDC(უაკ) 34(051.2)
ს-216

Published by the decision of Ivane Javakhishvili Tbilisi State University Publishing Board

ISSN 2233-3746

Stephan Schmitt *

Importance of Judicial Communication in Civil Proceedings in Germany

Two fundamental changes were introduced into civil procedure law at the beginning of XXI century with respect to the obligation of a judge to give directions and strengthening of the position of a mediator judge, meaning the authority of a judge to influence the parties to judicial proceedings and drive them to a settlement agreement. As a result of two new regulations the communication was strengthened both between a judge and the parties and the parties themselves. Hence, the role of a judge is no more limited only to leading the proceedings in accordance with established procedure and adoption of a well-reasoned decision, based on substantive law. A judge has more intensive communication with the parties before the resolution of a dispute, be it through a court decision or a settlement agreement reached between the parties.

This paper is an attempt to describe the main consequences of the new regulations and explain the new role of a judge.

The paper offers the justification that the terms of reference of a judge should be redefined through the expansion of the scope of his activities, what becomes particularly important in the sense of impartiality. The expanded scope of activities of a judge bears certain risks as well: on the one hand a judge is required to have direct communication with the parties and on the other - the parties are entitled to refuse this communication with a view to protection of their own interests - for instance, when a judge offers settlement conditions to the parties generating negative attitude of the parties towards him in doing so. The law offers a solution - to involve a dispute-reviewing judge and a mediator judge as different persons at different phases of case proceedings.

The paper will also discuss the financial benefits of judges' decisions based on party consensus.

***Key words**: new regulation of the duty to give directions, new regulation of the institute of a mediator-judge, bias and scope of activities of a judge, delimitation between a dispute-reviewing and a mediator judge, financial benefits of closure of proceedings through settlement, image of a judge, judicial power, legal education.*

1. Introduction

A civil law judge leads civil proceedings and establishes the rightfulness of the claims of the parties through his decisions based on the law in force and regulations. However, judge's communication with the parties is not limited to such "declarative" communication.

The fundamental difference from criminal law is that in civil proceedings a judge is required to speak to the parties about his potential decision. The scope of communication has been extended, posing the new requirements before a judge, for the fulfilment of which only the perfect knowledge of law is not sufficient.

During one of the newspaper interviews the Chairman of Criminal Panel of Federal Court of Justice of Germany, Fisher was asked (interview with the newspaper Die Zeit, 30.10.2010), whether what the current law students were lacking in his opinion. Fisher's answer was as follows:

* Doctor of Law, attorney, mediator, supervisor, mediation teacher at Dresden Technical University, retired chairman-judge.

"In most cases - the skills, i.e. social and psychological abilities. Practically, there things are not taught: the competences necessary for the conduct of proceedings can never be acquired during the studentship, most of the students lack communicative sympathy."

The answer to the next question - why was that important:

"Jurisprudence is the science, which is mainly based on speech. During their carrier they (the students) will have to make their professional speeches, protect the interests of the parties, resolve the conflict situations, and also they should be able to feel empathy towards the strangers."

The abovementioned two changes strengthened judge's communication during court proceedings, expanded its scope and also, changed its essence.

The first change is related to Section 139 of the Civil Procedure Code of Germany. As a result of the reform of the Civil Procedure Code in 2000, now a judge is required to give wide directions to the parties to proceedings and also, to ensure the conduct of court hearing. Under Section 139 of the Civil Procedure Code of Germany[1]:

1. To the extent required, the court is to discuss with the parties the circumstances and facts as well as the relationship of the parties to the dispute, both in terms of the factual aspects of the matter and of its legal ramifications, and it is to ask questions. The court is to work towards ensuring that the parties to the dispute make declarations in due time and completely, regarding all significant facts, and in particular is to ensure that the parties amend by further information those facts that they have asserted only incompletely, that they designate the evidence, and that they file the relevant petitions.

2. The court may base its decision on an aspect that a party has recognisably overlooked or has deemed to be insignificant, provided that this does not merely concern an ancillary claim, only if it has given corresponding notice of this fact and has allowed the opportunity to address the matter. The same shall apply for any aspect that the court assesses differently than both parties do .

3. The court is to draw the parties' attention to its concerns regarding any items it is to take into account ex officio.

4. Notice by the court as provided for by this rule is to be given at the earliest possible time, and a written record is to be prepared. The fact of such notice having been given may be proven only by the content of the files. The content of the files may be challenged exclusively by submitting proof that they have been forged.

5. If it is not possible for a party to immediately make a declaration regarding a notice from the court, then the court is to determine a period, upon the party having filed a corresponding application, within which this party may supplement its declaration in a written pleading.

Hence, the court is required to dive directions. When a party has evidently overlooked an important point of law or essence, or considered it of minor importance - say, has improperly interpreted a point of law or legal status - the court is required to pay party's attention to such a mistake. Otherwise the court would have been found contradicting the right to fair trial guaranteed by the Constitution (Constitution of the Federal Republic of Germany, Article 103, Para. 1), meaning that without the above-

[1] The new version of the Civil Procedure Code as a result of reform - 27.07.2001 (BGBl. I S. 1887) m.W.v. 01.01.2002.

mentioned directions the judge would have made his decisions on the basis of circumstances, the parties to the proceedings had not taken into account (the so-called inadmissible unexpected decision). By the end of oral hearing, when court finds, that the duty to give directions was violated, it is required to resume oral hearing (Civil Procedure Code, Section 156, Para.(2)1) and issue legally important directions. As per Section 139 of the Civil Procedure Code of Germany the duty to give directions covers not only to legal opinion, but also the content of the facts, that are important from legal point of view, and also the consequences of striking of evidences. The court is also required to study presented evidences both from legal and factual points of view[2]. The court directions aim as revealing ambiguities, flaws, and errors and their presentation in a transparent manner. Consequently, the judges are required to discuss the deficiencies revealed during the presentations of the parties specifically and purposefully. At the same time, the parties should be able to present their opinions regarding court directions and interpretations (court hearing), what makes civil procedure of dialogue type.[3]

The new regulation of Section 139 of Civil Procedure Code makes reference to the type of authority of a judge, which implies the possibility of judge's communication with the parties at the crucial moment of dispute resolution. A judge, who acts only according to own neutrality principle, is isolated, secluded from the parties, is no more concurrent with new challenges and is not desirable for the legislator either. The relevant directions, given by a judge, are quite important even behind indicative legal transparency. Judge's speech makes civil proceedings dynamic from other point of view as well: based on the directions the parties are in the position to influence the flow of the proceedings from quite a new angle; as a result of judge's directions the parties may engage in the discussion of some other matters as well and during this communication it is possible for judge's judgement to become the benchmark for the revaluation of risks by the parties. The negotiations between the parties may acquire quite a new meaning, what may lead them to new, alternative offers, with due consideration of neutral opinion of the judge, no matter it is will be uphold from legal point of view or not, but will rely on the presumption, that the decision will be based on this opinion. Consequently, judicial communication with regard to a case is not limited only to provision for a fair decision. More qualitative decision with regard to disputed matters can be made only under more intensive involvement of the parties in dispute resolution. In this case the quality of judge's communication speaks for his transformation into a mediator-judge.

Under the first sentence of Para.1 of Section 139 of the Civil Procedure Code the necessity of bilateral communication determines the reasonability of a settlement agreement instead of a decision made with regard to a legal dispute.[4] The duty of bilateral communication, provided for by the first sentence of Para.1 of Section 139 of the Civil Procedure Code is further specified by settlement process,

---

2 *Wieczorek/Schütze-Smid***,** ZPO, 4.Auflage 2013 Rn 71 zu § 139 ZPO.

3 *Wieczorek/Schütze* a.a.O. Rn 75. Federal Court of Justice of Germany in its decision of 02.10.2003, Az.: V ZB 22/03, published in BGH NJW 2004, 164, speaks about an "open dialogue" between the court and the parties or attorneys.

4 So ausdrücklich *Wieczorek/Schütze-Smid* .a.a.O. Rn 77. This link between the new regulation of the duty to give directions and the efforts of a judge to reach a settlement agreement is discussed in: *Prütting/Gehrlein*, ZPO, 6. Auflage 2014, Rn 44 zu § 42 ZPO, so gesehen.

discussed in Para.1 of Section 278 of the Civil Procedure Code, where the "program" of the legislator becomes apparent under the new regulations: saving time and resources, closure of a dispute through conflict settlement agreement, backed up with personal responsibility of the parties, what leads us to expedited legal peace.[5]

The second amendment of the Civil Procedure Code was conditioned by the adoption of the Mediation Law of 21 July, 2012,[6] which was concurrent with the EU Mediation Directive of 21 May, 2008[7] and provided for new regulation of Section 278 of the Civil Procedure Code.[8]

1. In all circumstances of the proceedings, the court is to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue.

2. For the purposes of arriving at an amicable resolution of the legal dispute, the hearing shall be preceded by a conciliation hearing unless efforts to come to an agreement have already been made before an alternative dispute-resolution entity, or unless the conciliation hearing obviously does not hold out any prospects of success. In the conciliation hearing, the court is to discuss with the parties the circumstances and facts as well as the status of the dispute thus far, assessing all circumstances without any restrictions and asking questions wherever required. The parties appearing are to be heard in person on these aspects.

3. The parties shall be ordered to appear in person at the conciliation hearing as well as at any other conciliation efforts. Section 141 (1), second sentence, subsections (2) and (3) shall apply mutatis mutandis.

4. Should neither of the parties appear at the conciliation hearing, the proceedings shall be ordered stayed.

5. The court may refer the parties for the conciliation hearing, as well as for further attempts at resolving the dispute, to a judge delegated for this purpose, who is not authorised to take a decision (Güterichter, conciliation judge). The conciliation judge may avail himself of all methods of conflict resolution, including mediation.

6. A settlement may also be made before the court by the parties to the dispute by submitting to the court a suggestion, in writing, on how to settle the matter, or by their accepting, in a corresponding brief sent to the court, the suggested settlement made by the court in writing. The court shall establish, by issuing a corresponding order, that the settlement concluded in accordance with the first sentence has been reached, recording the content of same in the order. Section 164 shall apply mutatis mutandis.

---

5 Justification of law RegE BT-Dr. 14/14722 S.2.

6 According to the law on the process of mediation and settlement of other extra-judicial conflicts 21.07.2012 (BGBl. I S. 1577) m.W.v. 26.07.2012.

7 The EU Directive on certain aspects of mediation in civil and commercial matters of 21.05.2008 (2008/52/EG) obliges national legislatures to bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before 21 May 2011. Already on 16.10.1999 the Council of Europe obliged the Members States to create alternative extra-judicial process. The second paragraph of Article 3 of the EU Mediation Directive explicitly requires regulation - "mediation by judge".

8 At the same time Section 278a provides for the option for dispute reviewing judge to suggest that the parties pursue mediation or other alternative conflict resolution procedures (e.g. arbitral tribunal) and order the proceedings stayed if parties agree to his suggestion.

According to these regulations, subject to judge's communication is not only a legal case, but also a conflict between the parties, which should be managed by a judge to the extent practicable. Resolution of a dispute does not only mean a claim filed with a judge, but rather a legally binding principle. Furthermore, a judge, reviewing legal disputes, gets involved during the settlement process, occurring in the course of dispute resolution (Civil Procedure Code, Section 278, Para.2) or by way of situation, during the dispute resolution, when judge identifies settlement chances and options (Civil Procedure Code, Section 278, Para.1). *Ex altera parte*, a dispute-reviewing judge acting as a mediator judge by virtue of Para.5 of Section 278 of Civil Procedure Code, is entitled to try to settle the conflict between the parties through employment of various methods, including mediation. Para.5 of Section 278 of Civil Procedure Code is based on voluntary participation of the parties and allows for a mediator judge to converse with each party to the extent that the parties have given their consent to this end.

The new regulation corresponds to the principle of respect of public values of civil proceedings. The opinion, that the main task of dispute-reviewing judge is just to make decisions, is strongly criticised; instead the skills of the judge to lead settlement process and allow the parties to resolve their dispute through settlement, come forward.[9] Based on the foregoing Federal Court of Justice of Germany ruled in 2007:

"In a rule-of-law state closure of a dispute through settlement should essentially prevail over the adjudication of a legal dispute.“[10]

Federal Court of Justice of Germany also stresses the importance of co-operational relations between the parties and hence places judge's efforts regarding settlement and judge's decision during litigation proceedings side by side from normative point of view. Federal Court of Justice of Germany regards both activities as the main task of a judge reviewing civil disputes.

"The experience shows that amicable settlement of a dispute is of paramount importance for judicial practice. Like a court decision, a ruling, it is also the core task of a judge and it should be accorded to the scope of main judicial activities of a judge like judge's decision.“[11]

---

9 *Von Bargen*, Gerichtsinterne Mediation. Eine Kernaufgabe der rechtsprechenden Gewalt, 2008, S. 192; *ders.*: Der Richter als Mediator, in: *Haft/von Schlieffen*, Handbuch der Mediation, Verhandlungstechnik, Strategie, Einsatzgebiete, 2. Auflage 2009, S. 946; *Voßkuhle*, Rechtsschutz gegen den Richter: Zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 GG, 1993, S. 93 f.; *Tochtermann*, Die Unabhängigkeit und Unparteilichkeit des Mediators, 2008, S. 32 m. w. N. *Schmitt*, Recht jenseits des Rechts, 2012; ders.: Stufen einer Güteverhandlung: Lehre einer imperfekten Gerechtigkeit, 2014.

10 Federal Constitutional Court of Germany - BVerfGE NJW-RR 2007, 1073; By decision of Federal Constitutional Court of Germany of 14.02.2007 (Az. 1 BvR 1351/01) the negotiations are meaningful when the situation is *prima facie* hopeless: "Successful closure of negotiations between the parties should not mean that conciliation process under the participation of a third person will again be hopeless. This is apparent even when during civil proceedings a dispute is resolved through settlement." The same goes true with a settlement agreement as resolved by Hanover Labour Court 1.2.2013, Az.: 2 Ca 10/13, published in: ZKM, 2013, S. 130 f.; *Greger/Weber,* Das neue Güterichterverfahren. Arbeitshilfe für Richter, Rechtsanwälte und Gerichtsverwaltung, in MDR, 2012, S. 9.

11 BGHZ 47, 275 (287).

According to the above decision the main task of a civil judge is the resolution of a conflict and dispute through reaching consensus.

Every judge is committed to law and justice. Both are associated with the goal to secure legal peace, and ultimately the social peace. Legal peace of the parties between themselves and also with the society and the State. Legal peace, or to be more precise, social peace requires:

- fair trial,
- party disposition, and
- protection of the society, its interest and laws.

This paper aims at discussing reasonable judicial negotiations, initiated by judges.

Advanced training of judges on this subject will change their attitude towards negotiations in the course of dispute resolution. The judges should not use judicial proceedings only for making references to normative expectations of law, its protection and sanctions for their breach. They should search for communication context in conflicts underlying disputes based on the experience gained in similar conflicts, find how to better approach the parties in order to overcome the existing blockage through concerted efforts. In consequence of such communication experiences a judge will learn and comprehend what to do: one the one hand, the judge will be strictly consistent when the case concerns normative assessments; in this case he will be able to defend himself against other possible ways of case-handling. On the other hand, he has to demonstrate empathy and compassion during the communication with the parties in the course of settlement; in this case the judge will be able to learn how to influence parties in favour of settlement, for them to reach a settlement agreement, preserving their autonomy.

It is an open secret for judicial practice that civil courts will not be practically able to cope with their workload without settlements and, respectively without potential saving resources and time this way. According to Reinhard Gregor - the former federal judge, co-author of Zöller's large Commentary on CPC and former mentor of the model of mediator judge of Bayern and Thüringen federal lands - only 40% of civil proceedings throughout German Federal Republic ended with adjudication and 60% - through settlement ofr similar co-operational procedures (withdrawal of a claim, recognition, amicable resolution). The foregoing evidences that settlement and amicable agreement are always the most desired solutions in the light of efficient resolution of disputes.

We hope, this paper will assist Georgian colleague judges to reach settlement agreements more efficiently in numerous cases under their review. It is beyond doubt, that attorneys and parties should also be involved in the process and give their consent; thus the paper also targets the attorneys and parties to disputes, to lead them to settlement agreements. According to recent statistics oral hearing - which allows for settlement - is the crucial factor. Oral hearing, opposed to written proceedings, increases party readiness for settlement by almost 27%, and more large-scale is a oral hearing, more efficient it is.[12]

[12] *Berlemann/Christmann/Focken,* Lassen sich Vergleiche und Berufungen vorhersagen?, in: DRiZ 2016, 62-65, hier: 63.

3. Limits of judicial communication

a. Impartiality of a judge

In the minds of the parties the above discussed connection between judicial communication with the parties and reaching a settlement agreement guarantees both the impartiality and independence of the judge and the principle of personal responsibility of the parties, and particularly the principle of party disposition. However, within the framework of this conception the account should be taken of the limits of judicial competence with regard to parties and attorneys.

The boundary of judicial communication is judge's impartiality, which in the case of occurrence of situations, envisaged by Section 42 of CPC, constitutes grounds for challenging the judge. The grounds for challenging a judge should be necessarily compatible with the duties of interpretation, sympathy and direction, envisaged by Section 139 of the CPC. Hence, based on the practice of Federal Court of Justice, the performance of a judge should not be considered biased if the interpretation given by him is compatible with Sections 139, 273, 278 para.2, 522 and Article 103, para.1 of German Constitution, or to be more precise, meets their requirements.[13] If law requires transparency from a judge, as mentioned above, provision of contextual or legal interpretations during litigations cannot be presumed as biased, prejudiced behaviour of the judge.

In certain cases this means that communication of his legal opinion by judge to the parties with regard to the case concerned does not constitute ground for his challenging for his bias. Exempted would have been only that case, when judge is so convinced is his opinion, that judgments, presented by the parties do not matter for him anymore.[14] In practice, the "temporariness" of judge's opinion means that he is supposed to stress the preliminary nature of his decision. However, according to judicial practice of federal courts stressing such reference is not mandatory, [15] but is applied for unambiguous interpretation of the matter. As a general rule, the judge's initiatives like directions, requests, explanations, advise and recommendations, do not constitute grounds for challenging him.[16] The situation is a bit different, when judge advices the claimant to expand the claim or the range of the parties.[17]

Disputable is the direction, like solicitation or reference to opposite rights, say statute of limitation (BGHZ 156, 269), set-off and the right to retain a thing. In any case, under the first sentence of paragraph 2 of Section 139 of the CPC if any of the parties is clearly mistaken the judge is required to provide the legal interpretation. E.g., when a party is not filing a defence, which can be accepted by the court only after its filing by a party (e.g. statute of limitation, set-off, retention of a thing), this can be

---

13 *Prütting/Gehrlein*, ZPO, 6. Aufl. 2014, Rn 44 zu § 42 ZPO; *Stein/Jonas*, ZPO, 22.Aufl. 2004, Bd. 2, Rn11a zu § 42 ZPO m.w.N.; BVerfGE 42, 88.

14 Higher Regional Court, Karlsruhe NJW-RR 2013, 1535.

15 Higher Regional Court, *Munich* MDR 2004, 52.

16 *Zöller-Greger*, ZPO, 31. Aufl. 2016, Rn 26 zu § 42 ZPO.

17 Higher Regional Court, Brandenburg, NJW-RR 2009, 1224, Higher Regional Court, Rostock NJW-RR 2002, 576.

presumed as party disposition and not as a "mistake" thereof[18]. The situation is quite different, when is apparent from the declaration of the party, that the latter tries, to discuss specific issues but is not explicitly presenting a defence.[19] In this case giving explanations and directions by the judge to the party is the mandatory principle and should not be criticized.

The discussions demonstrates, that the scope of judicial action in the course of dispute resolution is limited by the following principles::

- awareness of the parties (with regard to circumstances),
- maximum disposition of the parties (at legal level),
- sympathy of the judiciary towards the parties,
- neutrality of the judges, and
- equal tools of the parties.

For better visualization some cases from judicial practice of Federal and regional Courts of Justice are offered below:

Case of Federal Court of Justice (BGH):

The judge submits the justification of claimant's claim to the respondent and gives written directions to the claimant, the copy of which note is submitted to the respondent:

"As per the fourth sentence the statute of limitation of the claim could have been expired under the seventh sentence, if the respondent pleads for the statute of limitation".

The Federal Court of Justice found the challenge of the judge to be justified on the grounds of the argument that a judge is not entitled to make reference to the application of independent offensive and defensive means with separate legal grounds.

Paying attention to temporary waiver of the right to perform by the judge already means the communication of the decision in advance. The Federal Court of Justice explains, that the legislator has upheld this opinion in the new version of Section 139 of the of CPC through the reformation of civil procedure. The new regulations for conducting substantive law proceedings (CPC, Section 139, para.1), based on their essence and interpretation, provide that the courts are required to give more specific and detailed directions than in times of application of the earlier existing law. Section 139, para.1 of the CPC stresses that during the open discussion with the parties the court is required to explain matters, that are crucial and essentially important for decision-making and should act for the benefit of the proceedings to maximum practicable extent. This stipulation of law also introduces principle, that judge should not aim at revealing grounds for a new claim, motion or statement through his questions or explanations, which are not based, at least on the declarations of disputing parties. The absence of these explanations, the

[18] *Baumbach/Lauterbach/Albers/Hartmann*, ZPO, 73. Auflage 2015, Rn 43 zu §2 ZPO: „Die Fürsorgepflicht des Gerichts steht nicht über der Parteiherrschaft."

[19] E.g. a party declares that the situation is too protracted and it should come to an end. With regard see *Prütting/Gehrlein* a.a.O. Rn 49 zu § 42 ZPO, The question of the judge, whether the party was challenging the statute of limitation, was not regarded as a demonstration of bias as the foregoing was concurrent with the requirements of Section 139 of the CPC. See also *Zöller-Greger*, ZPO, 31. Aufl. 2015, Rn 17 zu § 42 ZPO.

[20] Federal Supreme Court NJW 2004, 164; also Humm Higher Regional Court MDR 2013, 1121.

necessity of which does not exist due to above reasons, does not embody the decision with unexpected content under para.2 of Section 130 of PCP.[20]

Decision of Frankfurt Higher Regional Court:

After oral hearing the court issued the following verbal direction: "The problem of legalisation of the right-holder can be resolved through assignment of the right."

Due to the foregoing the representative of the respondent party considered the judge biased.

Frankfurt Higher Regional Court found:

The court is not entitled to provide a party with essential justification of his suit and thus violate the adversarial principle; it is prohibited to make reference to otherwise justification of the suit and thus prepare a base for the claimant to win. Respectively, the court is not entitled to reveal the new ground of the suit. By virtue of the above reference the claimant could have imagined that the judge would have considered the application of faulty legitimacy of the right-holder unjustified and thus would have given momentum to the claimant to avoid the abandonment of the suit.[21]

Decision of Frankfurt Higher Regional Court with contrary legal opinion:

For the establishment of the bias of the judge, it is not sufficient for the respondent to have impression due to given direction, that the judge tries to save the claimant from the abandonment of the suit only for the absence of his (claimant's) legitimacy as an right-holder. Every direction/ explanation made in the course of civil proceedings with regard to either party, should protect the addressee against any negative procedural consequence. The bias against one of the parties can be established only when such explanation was not conditioned by the flow of the proceedings, position of the party or substantive-law circumstances. The above case was the manifestation of the foregoing. Particular complexity of the case concerned in the light of substantive law justified the judge in giving directions even to the party, who was represented by the attorney and thus, in the case of reasonable evaluation of the situation the respondent party had no doubts about the bias of the judge. The judge explains to the claimant, that he has not legitimised himself as the holder of the right as yet and advices him to have the third party assign the claim in his favour.

During the other proceedings the court examined evidence through interrogation of a witness to clarify whether the claim was assigned to the claimant or not. Based on the foregoing the court made a decision and rejected suit due to the lack of legitimacy of the claimant. Furthermore, it explained, that the claimant's legitimacy was not satisfactory.

Federal Court of Justice considered judge's behaviour as faulty and breaching Section 139 of the CPC. Federal Court of Justice believes that through striking of the evidences the court demonstrated that is has considered claimant's declaration as well-substantiated.

Based on the foregoing the court should have made relevant reference to the absence of claimant's

[21] Frankfurt Higher Regional Court NJW 1970, 1884; Frankfurt Higher Regional Court MDR 2007, 674, *Schneider*, NJW 1970, 1884: only admissible, important for the case explanations on the part of the judge.

legitimacy and rejection of the suit on this grounds before making its decision.

The explanations are mandatory when the court wants to announce a opinion, dissenting from already made court decision/order. Otherwise there is no solution to the case, when suit lacks subject competence and it should be recognised as unjustified when it could have been concluded on the basis of an order striking of the evidence, that the suit was recognised as well-founded and particularly when the legitimacy of the claimant was evident.[22]

In other decisions the proceedings developed as follows:

The suit was not satisfied by ruling of the regional court of first instance. The claimant appealed the decision. The oral hearing at regional supremen court was scheduled for 5 September, 2012. The day before the trial the challenged judge contacts defendant's attorney by phone and communicates his legal opinions to him. Along with the other matters the telephone conversation concerned the testimonies of witnesses as well, about which testimonies the challenged judge and the attorney were of different opinon. The judge explained that the case might not even come to adjudication as the evaluation of the facts of the case were against the defendant. He also mentioned, that he would discuss his opinion in more detailed manner during the scheduled session and at the same time would make an offer regarding settlement. Furthermore he advised the attorney to inform the defendant or, to be more precise, his insurance agent anout this offer before the scheduled date. The challenged judge debriefed the claimant's attoney as well about this conversation.

During the oral hearing the defendant challenged the judge on the grounds of his biased attitude.

Fear for bias is not justified in this case as the judge's behaviour falls within the framework of the CPC. Under the first sentence of para.4 of Section 129 of the CPC the court is required to give the necessary directions at earliest opportunity. Under para.1 of Section 278 of the CPC in any circumstances the court is required to be oriented on the resolution of a dispute through settlement. By virtue of the reform of the CPC of 27 July, 2011 the legislator specifically stressed, that the settlement agreement should be reached between the parties at earliest possible stage.[23] The court is free is selecting medium. Along with oral hearing the directions can also be made either in writing or through telephone communication.[24] The merit of judge's behaviour is that the attorney was given opportunity to communicate judge's legal opinion to the party before the scheduled dated of proceedings. These directions may concerns the legal and economic modes of further conducting the proceedings. The attorney may take account of these opinions when getting ready for oral hearing. The fact that the judge did not agree to legal assessment of defendant's attorney and has not changed his position even during the telephone conversation, does not justify otherwise qualification of the matter. The judge made references to specific points of law and at the same time offered settlement. Accounting for that, even before the oral hearing the defendant was aware of legal and factual circumstances, what allowed him to

[22] Federal Court of Justice, NJW 2007, 2414.

[23] BT-Drucks. 14/4722, S. 58

[24] Bremen Higher Regional Court NJW-RR 2013, 573; Federal Court of Justice NJW 2006, 60, 62. *Zöller/Greger*, ZPO, 29. Aufl., § 139 Rn. 12; *MünchKommZPO/Wagner*, 5. Aufl. 2016, § 139 Rn. 56.

defend his legal position at oral hearing in accordance with the foregoing. It should be stressed, that the content of the conversation clearly demonstrated, that there was no focus on final decision, but rather the judge said during this telephone conversation that he was going to explaine his directions at the session.

At one of judicial proceedings the attorney would state the court had sufficient grounds to believe that the judge was biased as one month prior to trial the judges of regional court, including the challenged one, had agreed on uniform approach to all parallel proceedings, including proceedings concerned, according to which approach the defendant was to be informed about intentional deceit. In the opinion of defendant's attorney, this agreement was against the defendant, constituted willful and immaterial action and aimed at avoidance of the scrutiny of evidences. According to attorney's statement the foregoing was proved by the representation made by the judge concerned within the framework of the other case, under which representation he was not going to change his opinion (the agreed one). Furthermore, in other parallel proceedings the challenged judge resolved the material for the dispute point of law in accordance with the agreement. The judge made an announcement about his (concurrent to the agreement) position at the proceedings concerned as well.

By decision of Karlsruhe Higher Regional Court, there was no bias on the part of the judge. Sharing legal opinions at oral hearing even when they were voiced via decisions or opinions at other parallel proceedings does not allow for finding grounds for biased attitude. The same goes true, when civil panel reviews a multitude of similar cases and the case-reviewing judge tries to find a common line, direction in resolving a specific matter.[25]

The below case was modeled after a decision of the Federal Court of Justice:

After the scrutiny of the evidences the court offers settlement to the parties, what is rejected by the defendant. The Panel issues recommendations with this regard. The chairperson notifies the parties that the suit was not satisfied by decision of the Panel, howeverm he still makes reference to a settlement agreement, earlier offered by the court. The judge provides the parties with already drafted, but not-signed text of the decision and then starts the discussion of the settlement agreement. The defendant's representative challenges judge for being biased.

In this case one may definitely speak about the bias of the judge as the court clearly declares, that if parties fail to come to an amicable agreement, the draft decision will become a decision and relevantly they will not have any other change to present their arguments and legal opinions, even if the oral hearing is not yet closed.[26]

[25] Karlsruhe Higher Regional Court NJW-RR 2013, 1535.
[26] Federal Court of Justice NJW 1966, 2399 (mit Anmerkung).

During the oral hearing the judge explains to the claimant that the defendant is not liable to him, i.e. the claimant has incorrectly chosen him as a respondent. The court offers the claimant to file a suit against a real defendant, respectively the cases come the expansion or substitution of the party.

This advice of the judge is so far-reaching, that bias may be found in this case.[27] The same goes true with the case, when court offers one of the parties to file a new claim, a new suit or counter-motion.[28]

The Court of Appeals contact the appellant by phone and advises him to withdraw his appeal as he has no prospective to win.

Based on common judicial practice, no bias is implied here, as the court discusses legal consequences based on its legal opinions.[29]

b. Hazards of judicial communication

The failure of a judge to fulfil the statutory duty about giving directions as required is regarded not as his bias but rather a procedural mistake of a judge, which can be corrected through appealing it with the court of appeals (CPC. Section 529, Para.2(2).[30] The situation is different when judge gives directions that are not allowed by law, e.g. the judge informs the party about the option of submitting a defence due to the statute of limitation despite the fact that it was not clear for the court whether the parties were willing to file such motions. The same goes true with the directions like expansion of claim, continuation of proceedings against or together with the other persons. In this case, as a general rule, the bias of a judge is clear. The forgoing excludes the possibility fo the judge, who issued directions, to be decision-making judge. However, quite often this is a sham victory of the party, who challenged the judge. The party may enjoy the right to raise a question of statute of limitation with the new judge, but this will not make good the unlawful action of the previous judge.[31] The same goes true with inadmissible directions of the judge, like amendment of a claim, expansion of the range of the parties or their substitution. Even when a judge is successfully disqualified from the case, it is impossible to withdraw, correct the communication, made by him, which was not justified under CPC Section 139. It is also possible for the communication of the judge to become detrimental for the parties during the settlement process, which damage cannot be prevented by judicial system. E.g. Under Para. 1 and 2 of CPC Section 278 an "induced" reconciliation may occure during the resolution of a dispute, meaning that the judge may "induce" the parties to reconcile or act in a patriarchal manner. In this case the parties

27 *Baumbach/Lauterbach/Albert/Hartmann*, ZPO, 73. Aufl. 2015, Rn 41 zu § 42 ZPO.

28 *Baumbach/Lauterbach/Albert/Hartmann*, ZPO, 73. Aufl. 2015, Rn 40 zu § 42 ZPO.

29 Stuttgart Higher Regional Court, MDR 2000, 50; for differentiation see: *Baumbach/Lauterbach/Albert/Hartmann*, ZPO, 73. Aufl. 2015, Rn 42 zu § 42 ZPO: There is no bias, when court approves the motion for withdrawal of an appeal, by the bias is evident, when the court advices to withdraw the appeal. This differentiation is rather formal.

30 Decision of Federal Court of Justice 29.10.2012, Az.: V ZB 286/11; *Prütting/Gehrling* a.a.O. Rn 50 zu § 42 ZPO.

31 The principle of a "fruit from forbidden tree" does not apply here.

suppose, that refusal of settlement, offered by judge may result in negative consequences for them during the decision-making process. Hence in such cases the maxim, which is based on the experience, is in play: "The one, who opposes is the one to lose".

In the case of communication on settlement agreement there are complication from the perspective of a judge as well: a dispute-reviewing judge, who makes every effort to reconcile the parties has to fight with his own self, his emotions and negative attitude towards the party, who refuses settlement. Longer and more intensive are the efforts of the judge to reconcile the parties, more negative is his attitude towards the party, who is the reason of non-reaching the agreement.

As for the party, who refuses settlement, he has the impression that even if judge does not objectively "oppress" the party refusing settlement, in the case of losing the case he will still think that the judge was "upset" and "angry" with him because he rejected settlement. In such cases the judge cannot prevent the impression of the party, who refused settlement, that he was "punished" by judge for his "disobedience" - even if this impression is groundless.

The foregoing evidences that judicial communication has its risks: when judge speaks about his actions and decisions, thus exceeding permitted limits, at least one party may be prejudiced, what cannot be either corrected or withdrawn by an oversight authority. Bias/impartiality of a judge in the case of failed settlement can hardly be avoided. Here PCP Section 278, para.5 may turn helpful, which says, that during long and tedious negotiations it is important for the case to be reviewed by another judge, who does not review legal disputes in general.

The reforms of civil procedure law in German law, which strengthen judges communication with the parties irrespective of certain risks, demonstrate institutional confidence in process-relevant communication of a judge. Confidence, of course, may lead to the abuse of power and disappointment, but at the same time may give rise to trust and thus strengthen the reputation of judiciary.

3. Cost Advantages of Court Settlement in Germany

The German law employes an incentive system, meaning granting financial advantages to parties and attorneys if they close their cases through settlement.

For example, if an attorney negotiates a settlement agreement under Appendix 1 to Section 2, Para.2 of RVG KV N1000 (List of Fees under the Lawyers' Remuneration Act), he will be additionally entitled to the agreement fee. This additional fee is added to his basic remuneration. This fee is not calculated from the value of either the dispute or the subject of the dispute, but rather based to the value of the interest embodied in the settlement agreement. E.g. two brothers are disputing about the will. One of the brothers demands 10 000 Euros from the other and at the same time, the parties agree upon the collection of books, worth of 5 000 in the course of dispute resolution. Although this collection was not subject matter of the dispute, it will still be regulated by settlement agreement and the remuneration of the lawyers will be as follows:

- Fee for the settlement of the dispute, worth of 15000 Euros.

- As per KV №.3104 - (1,2 times) fee for participation in judicial proceeding from 15 000 Euros.[32]
- 1,3 times proceedings fee from the subject matter of the dispute under KV №.3100 - in this case from 10.000 Euros.
- 0,8 times difference fee under KV №.3101 №.2, from additional amount of settlement - from 5.000 Euros.[33]

The same plinciple applies when oral hearing was planned, but parties negotiated a written settlement agreement without holding it.[34]

When parties reach a settlement agreement in the course of case proceedings, the court duty is reduced for the parties: as a general rule there are three types of court duties in every legal dispute, caluculated according to the subject of the dispute concerned (Section 3, para.2 (court fees) GKG, Nr. 5110, Appendix 1). In the case of withdrawal, recognition, abandonment of a suit or court-based settlement, the above three types of court fees are reduced to one, respectively the amount of two other fees is returned to the parties. As shown in the above example, if additional issues are settled during the dispute resolution, which issues do not constitute the main subject of the dispute - in our case worth of 5 000 Euros - 0,25 times of court fees are calculated from this additional amount to be additionally paid to the court.

4. Conclusion

The above analysis demostrates that as a result of procedure-law novelties the communication equity was introduced in civil proceedings along with procedural and substantive equity, creating the new paradigm of judicial actions. This expansion requires the creation of the new type of judge, new competences of the judge with regard to parties and their specific interests. Respectively, the education/training of judges and all the other persons participating in judicial proceedings requires new focus. The attention should be paid to this very aspect.

Bibliography

1. *Baumbach/Lauterbach/Albers/Hartmann*, ZPO-Kommentar, 73. Auflage 2015, nach Paragraphen und Randnummern zitiert.2.*Gerold/Schmidt-Müller-Rabe*, Rechtsanwaltsvergütungsgesetz, 19. Auflage 2008, nach Verzeichnis (VV) und Randnummern zitiert.

[32] *Gerold/Schmidt-Müller-Rabe*, Rechtsanwaltsvergütungsgesetz, 19. Auflage, Rn 80 zu VV 3104.

[33] *Gerold/Schmidt-Müller-Rabe*, Rechtsanwaltsvergütungsgesetz, 19. Auflage, Rn 75 zu VV 3101. Of course, the difference fee is limited: at most, a lawyer will receive 1,3 times of fee for the participation in proceedings from the value of the subject matter of the dispute, plus the amount, subject to additional agreement, i.e. in the case concerned from 15000 Euros. *Gerold/Schmidt-Müller-Rabe*, Rechtsanwaltsvergütungsgesetz, 19. Auflage, Rn 80 zu VV 3104.

[34] Federal Court of Jusctice Anwbl 2006, 71; *Gerold/Schmidt-Müller-Rabe*, Rechtsanwaltsvergütungsgesetz, 19. Auflage, Rn 56 zu VV 3104.a.

2. MünchKommZPO-*Wagner*, 5. Aufl. 2016, nach Paragraphen und Randnummern zitiert.
3. *Prütting/Gehrlein*, ZPO-Kommentar, 6. Aufl. 2014 nach Paragraphen und Randnummern zitiert.
4. *Stein/Jonas*, ZPO, 22.Aufl. 2004, nach Band, Paragraphen und Randnummern zitiert.
5. *Wieczorek/Schütze-Smid*, ZPO, 4.Auflage 2013, nach Paragraphen und Randnummern zitiert.
6. *Zöller-Greger*, ZPO-Kommentar, 31. Aufl. 2016, nach Paragraphen und Randnummern zitiert.
7. *Berlemann, Michael/Christmann, Robin/Focken, Niels*: Lassen sich Vergleiche und Berufungen vorhersagen?, in: Deutsche Richterzeitung (DRiZ) 2016, 62.
8. *Greger Reinhard, Reinhard/ Weber, Harriet*: Das neue Güterichterverfahren. Arbeitshilfe für Richter, Rechtsanwälte und Gerichtsverwaltung, in: Monatsschrift für deutsches Rechts (MDR) 2012, S. 9.
9. *Schmitt, Stephan*: Recht jenseits des Rechts, 2012 (Dissertation).
   Schmitt; Stephan: Stufen einer Güteverhandlung: Lehre einer imperfekten Gerechtigkeit, 2014.
10. *Schneider, Egon*, Neue Juristische Wochenschrift (NJW), 1970, 1884.
11. *Tochtermann, Peter*: Die Unabhängigkeit und Unparteilichkeit des Mediators, 2008, S. 32.
12. *von Bargen, Jan Malte*: Gerichtsinterne Mediation. Eine Kernaufgabe der rechtsprechenden Gewalt, 2008, S. 192 (Dissertation).
13. *von Bargen, Jan Malte*: Der Richter als Mediator, in: Haft/von Schlieffen: Handbuch der Mediation, Verhandlungstechnik, Strategie, Einsatzgebiete, 2. Auflage 2009, S. 946.
14. *Voßkuhle, Andreas*: Rechtsschutz gegen den Richter: Zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 GG, 1993, S. 93 f.
15. BGHZ 47, 275 (287) BGHZ 47, 275 (287).
16. BGH NJW 2004, 164.
17. BGH Anwaltsblatt (Anwbl) 2006, 71.
18. BGH NJW 2007, 2414.
19. BGH NJW 2006, 60, 62.
20. BGH, Beschluss vom 29.10.2012, Az.: V ZB 286/11.
21. BVerfGE NJW-RR 2007, 1073.
22. BVerfGE 42, 88.
23. OLG Karlsruhe NJW-RR 2013, 1535.
24. OLG München MDR 2004, 52.
25. Brandenburgisches Oberlandesgericht NJW-RR 2009, 1224.
26. OLG Rostock NJW-RR 2002, 576.
27. OLG Hamm MDR 2013, 1121.
28. OLG Frankfurt, NJW 1970, 1884.
29. OLG Frankfurt MDR 2007, 674.
30. OLG Frankfurt MDR 2007, 1884.
31. OLG Bremen NJW-RR 2013, 573.
32. OLG Karlsruhe NJW-RR 2013, 1535.
33. OLG Stuttgart MDR 2000, 50.
34. *Arbeitsgericht Hannover*, Beschluss vom 1.2.2013, Az.: 2 Ca 10/13, veröffentlicht in: Zeitschrift für Konfliktmanagement (ZKM), 2013, S. 130 f.