Prätorischer Vergleich and municipal mediation offices – the historic development of alternative dispute resolution schemes in Austria and what they mean for contemporary legislators?

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The text aims to highlight certain alternative dispute resolution (ADR) methods existing in Austrian civil law since the 19th Century. Austrian law and legal tradition, closely linked to its Polish counterparts, serve as sources of inspiration for Polish scholars and legislators. Nowadays, possibly more than ever, the heavy caseload of modern courts combined with evidentiary and procedural burdens call for the increased importance of ADR. The EU actively promotes the development of ADR. Therefore, the evolution of the approach to out of court dispute resolution methods in Austria is depicted against a widely understood historical background, in connection with the German legal tradition. Furthermore, the text describes this evolution as related with the deep political changes in Austria (Constitution of 1867) and the enactment of a modern civil procedure code in 1895. The authors concentrate on two institutions: municipal mediation offices (Gemeindevermittlungsämter) and the special pre-court settlement before the District Court (prätorischer Vergleich), comparing the latter with the Polish regulation of court conciliation proceedings. This analysis leads to certain conclusions regarding the inspiration that the Austrian legislation may serve as in future.

**Key words**: Austria; Austria-Hungary; Galicia; ABGB; ZPO; ADR; pre-court settlement; motion to set conciliatory hearing.

**List of abbreviations:**

ABGB - Allgemeines Bürgerliches Gesetzbuch, the Austrian Civil Code of 1811.
d.c.c. - Regulation of the President of the Republic of Poland of 29 November 1930
- Of p. - State Gazette (Austrian, pre-1918)
LGBI. - Landesgesetzblatt (Austrian national law gazette, containing local laws of the crown/union states)
- RGBl. - Reichsgesetzblatt (Austrian State Gazette pre-1918, German version)
ZPO - Austrian Code of Civil Procedure of 1895 - Gesetz vom 1. August 1895 über das gerichtliche Verfahren in bürgerlichen Rechtsstreitigkeiten (Zivilprozessordnung)
Alternative dispute resolution, its significance and potential for development.

The last decades have witnessed an ever-increasing interest in alternative methods of dispute resolution (ADR). ADR is understood as to encompass all mechanisms that lead to out-of-court, consensual settling of a dispute, usually with the assistance of a third party (an arbitrator, a mediator etc.). Proponents of alternative dispute resolution (ADR) argue that various ADR schemes allow for simpler, more efficient remedies for parties, simultaneously lowering the caseload encumbering courts. Apart from purely utilitarian views underlining the economic benefits of ADR, there exist compelling moral and political (‘Justice delayed is justice denied’ can be understood both as a wrong effect against an individual as well as a failure of the state) arguments supporting it, along with sociological and psychological analyses underlining that parties, on average, are much more willing to accept a settlement (especially one at least partially in their favour) that a court verdict.

The desire, on the one hand, to relieve the overstretched courts of case load and to improve the resolution of pending cases, and on the other - to facilitate the amicable finding of solutions to conflicts that would be maximally satisfactory for the parties, must lead to ADR methods. The role of ADR in EU has been officially sanctioned in Directive 2008/52/EC. It has given impetus to several European laws to further extend the range of legal instruments designed to enable the pre- or out-of-court conciliation of disputes. The European Commission has issued two Recommendation that seek to install certain quality criteria that all ADR schemes in the EU should allow the parties to enjoy. European institutions have also facilitated the creation of certain institutions or networks seeking to promote cross-border out-of-court settlement of disputes.

Particularly in Poland, this has been a subject of intense interest for some time, and deservedly. Just as in the case in the US and the EU, the rate of civil litigation has been increasing by a little over 62%. Between 2015 and 2020, the average length of court proceedings increased by 2.8 months (a 67% increase from 4.2 to 7 months). The courts are overburdened, regardless of the relatively high number of judges in relation to the population.

The reasons for such a situation have been widely discussed elsewhere. Here we, as Polish scholars, treat the facts as given and desire to describe how a different legal system, yet one closely linked to ours, has ventured to design various forms of out-of-court dispute resolution.

Though, as a result, inter alia, of recent amendments to the Polish Civil Procedure Code, the role of mediation or other ADR schemes seems to be growing in Polish law, it is submitted that in practice their role is still insufficient. This is evidenced e.g. by the actual fictitiousness of the institution of application for a summons for a conciliation attempt (Articles 184 et seq of the Polish Civil Procedure Code). This may stem from lacking social unawareness or fixed mentality issues, but arguably: mostly from ADR methods not being grounded in tradition, and thus being generally unfamiliar.

In view of the situation outlined above, it seems worthwhile to take a glance at the ways in which amicable resolution of civil disputes is addressed in neighboring countries. This article attempts to briefly outline the out-of-court and pre-court dispute resolution methods offered by Austrian law. The Austrian system is geographically and historically not far removed from the Polish one, moreover, numerous Austrian regulations pertaining to the discussed issues remained in force in the former Austrian territories during the interwar period. Possible inspiration of the Polish legislator would therefore be particularly justified in this case.

As it seems, this multifaceted proximity justifies the need for at least a cursory analysis of the Austrian regulation – both in terms of understanding the genesis of our local legislation and in terms of the directions of its further development. Finally, we will argue that having shown both the historical development of ADR schemes in Austria and their status (are they utilized? Do they help free the system of over-encumbrance?), considering the similar state of affairs in Poland, both countries should move toward a system (modelled after the German experiences) where settlements made before attorneys will be awarded a status equal to court settlements.

1. See e.g. OECD, Recommendation on Consumer Dispute Resolution and Redress (Paris, OECD, 2007).
5. E.g. the European Consumer Centres Network or FIN-NET.
10. In particular, the Act of 10 September 2015 amending certain acts as to promote certain amicable methods of dispute resolution, Journal of Laws of the Republic of Poland of 2015, item 1595.
Pre- and extrajudicial dispute resolution in the Germanic legal tradition

Settling disputes amicably as an overriding principle may seem something inherent to civil matters (see e.g. Article 10 of the Polish Code of Civil Procedure). However, in the part of Central Europe, where in the modern period German and Austrian laws were in force (two systems that have always remained closely connected, as late as till the 18th Century – fundamentally identical), this idea is relatively fresh. As far back as the Austrian General Court Ordinance of 1781 (Allgemeine Gerichtsordnung) it had been strictly forbidden for courts to exert any pressure on the parties to reach a settlement, except in exceptional situations such as matrimonial cases or possessory proceedings. These powers were extended by the Allgemeine Gerichtsordnung for Western Galicia in 1796.

It can be said that various forms of conciliation at the local level enjoyed great success in Germany in the 19th and 20th centuries and still play a significant role today, undoubtedly influenced by the strong tradition of decentralization and localism that has been ingrained since the time of the Holy Empire. This is the basis for the modern German conciliation procedure (Güterverfahren), which, interestingly, is compulsory in some cases. It is administered by a variety of bodies, such as the Ortgerichte in Hesse, which stem from the former forestry courts (Haingerichte), or the arbitration offices in some German Länder (Schiedsämter).

Mediation plays an important role in German law. For the last decade, a separate statute – the Act of 21 June 2012 (Mediationsgesetz), hereinafter: MedG – comprehensively regulated the issues of civil matters' mediation. MedG was intended to implement the provisions of the Mediation Directive in Germany. However, from a practicing lawyer’s point of view, the significance of mediation and other ADR schemes is facilitated by German procedural law. Pursuant to § 278(1) ZPO, courts shall at all times encourage the parties to settle the case amicably, at least with respect to individual points of dispute. A similar rule may be found in § 204 of the Austrian ZPO. An obvious analogy exists also with Article 10 of the Polish Code of Civil Procedure, as well as with the new regulation – the Article 205§6] § 2 of the Polish Code of Civil Procedure, one allowing the presiding judge to actively seek with the parties some amicable ways to resolve the dispute, assist the parties in formulating settlement proposals and indicate the means and implications of resolving the dispute, including the financial implications thereof.

The Austrian ADR tradition and its specific features

The situation in Metternich-era Austria was different from that in the rest of the Reich. There was no tendency to support the tendency to settle disputes out of court – this was also an expression of the distrust regarding the shifting of the administration of justice to the hands of independent laymen, as characteristic of the absolutist era. Substantive legal provisions on settlement have been included in the ABGB (§ 1380 et seq.) and are still in force today. In addition, special regulations for the pre-trial settlement of disputes have been developed, such as the Dalmatian pre-trial settlement instruction of 1829. A dear breakthrough, however, came with the profound internal restructuring of the Habsburg monarchy in the 1860s, when Austria was transformed from an absolute and centralised state into a state governed by law – a constitutional monarchy. This transformation also entailed changes in the legal system, in the organisation of the judiciary and the form of the trial; the Liberals attached importance to the participation of the public in the trial, introducing the institution of juries to a limited extent. However, it was not until the constitutional era, dating back to 1867 in Austria, that the principle of consensual dispute resolution was implemented.

By virtue of the Act of 21 September 1869, broadly amended in 1907 and in 1984, institutions named municipal (communal) mediation offices (Gemeindevermittlungsamt) were established. These offices were staffed by lay trusted representatives (Vertrauensmännern). These institutions were able to proffer the settlement of monetary disputes as well as those pertaining to movable property, along with cases for the determination or rectification of real property boundaries, easements on land, housing rights and possession; later on, matrimonial disputes were also allowed to be settled under the mediation offices’ powers. The establishment of these offices and the detailed issues as to their jurisdiction and powers, such as the imposition of disciplinary sanctions, were left to the crown states’ discretion, enacted through their local laws. The Viennese Act on Municipal Mediation Offices of 26 April 1984 is an example of such a detailed regulation, proscribing, among other things, the procedure for the

17. Ein Neuerungsvertrag, durch welchen streitige, oder zweifelhafte Rechte dergestalt bestimmt werden, daß jede Partei sich wechselseitig etwas zu geben, zu thun, oder zu unterlassen verbindet, heißt Vergleich. Der Vergleich gehört zu den zweisegturn verbindlichen Verträgen, und wird nach eben denselben Grundsätzen beurtheilet.
19. Law on the conditions under which agreements reached with the union representatives of the municipality, as well as the payments made on such agreements, are enforced, RGBl. 1869, No. 150.
20. OJ 1907, No. 59.
21. See Article III of the aforementioned 1907 Act.
election of trusted representatives or the procedural rules governing the mediation proceedings. The regulation described above is still in force in Austria today. At present, mediation offices exist in Vienna, Styria, Tyrol and Vorarlberg i.e. in four of Austria’s nine provinces (Länder), but they do not play an important role in the justice system; one reason, among others, why they have not become widespread is because as early as 1873, a simplified civil procedure for minor cases (the so-called Bagatellverfahren) came into force, offering effective tools for the quick resolution of minor disputes through modern (for the the-contemporary standards), open court and oral proceedings. In this statute, for the first time in the history of civil procedure evidence from the parties’ depositions was introduced, and its principles became the basis for the subsequent civil procedure codification – Austrian ZPO. Similarly, to other European states, mediation is playing an increasingly important role in Austria. In Austria, as in Germany, civil matters’ mediation is governed by a statute separate to the general procedural codification – the Zivilrechts-Mediationsgesetz of 2003. It was the first statute of its kind in Europe and was a model for, inter alia, the German law referred to above; however, it differs from the German law in that it was enacted before the passing of the Mediation Directive. It introduced the institution of a “registered mediator” (eingetragener Mediator), authorized to wear a state-issued badge and entered in a list maintained by the Minister of Justice (§ 8 ZivMedG). Importantly, pursuant to ZivMedG, the limitation period times are suspended during the mediation (§ 22 ZivMedG). It bears noticing also that mediation may also be conducted by unregistered persons. In Poland, to become a mediator, one must complete a course consisting of classes both theoretical and practical (total amount of which, attested by a course completion certificate, as a result of which the chair of the relevant district court enters the candidate in the list of permanent mediators.

Prätorischer Vergleich – not so much an Austrian peculiarity?

A great achievement of 19th century Austrian legislation was the creation of the modern code of civil procedure (Zivilprozessordnung, ZPO). Inspired mainly by German models, the procedural law of 1895 remains in force in Austria to this day, which is proof of the undoubted success of this codification.

In the text of the ZPO, the legislator made use of an institution present in the system of Austrian law since 1881, providing for – in § 433 – the possibility of entering into the so-called “praetor’s settlement” (prätorischer Vergleich). In its original wording the statute stated: Whoever intends to bring an action in a case for a sum of money up to five hundred guildens or for any other disputable object of the same value, has the right, before submitting the action, to ask the county court with jurisdiction over the action to summon the opponent in order to hear the case and bring about an amicable settlement, if the opponent lives in the district of the county court. (...) There is no legal remedy against the decision made on such motion.

This provision remains in force and has been only slightly amended – as late as in 1914, as an element of a series of amendments to the ZPO aimed at relieving the courts of the extensive caseload (a problem known a century ago), the upper limit for the value of the matter at issue restricting the possibility of entering a settlement was abolished. Under § 1(1)(5) of the Austrian Enforcement Ordinance (EO), such a settlement constitutes an enforcement title. At the same time, as is indirectly apparent from the quoted provision itself (regulating the court’s jurisdiction over settlement issues), only an adversary who is domiciled in Austria or actively conducts business therein can be summoned to conclude such a pretor settlement. Even a most cursory glance at the described regulation shows that in fact we are dealing with an institution deceptively similar to an application for a summons for a conciliation attempt, present in the contemporary Polish Code of Civil Procedure, whose Articles 184 and 185 are directly inspired by Article 453 of the previous Polish Code of Civil Procedure of 1930. The wording of this provision seemingly may had been inspired by, or even directly copied, the content of the Austrian codification. Significantly in this context, the Austrian regulation of arbitration proceedings in ZPO (§ 581 et seq.) constitutes – via the repealed Polish Civil Code of 1930 – also the basis for the contemporary Polish regulation, contained in the Code of Civil Procedure now in force. It can therefore be said that the Polish regulation of pre- and out-of-court dispute resolution proceedings contained in the Polish Code of Civil Procedure derives directly from the ZPO. This is yet another example of how close both these legal systems are to each other, and thus – that their comparative analysis may be fruitful.

24. OJ 1873, No. 66.
29. See P. Oberhammer, T. Domej, op. cit., 120ff.
32. OJ 1914, No. 118, the so-called Gerichtsentlastungsnovelle.
34. Article 453 § 1. Irrespective of the adjudication of civil cases, county courts shall have jurisdiction to conciliate the parties.
All these parallels should not come as a surprise – after all, the Austrian codification had been in force and applied for over three decades (including in the interwar period) in Galicia, the only area after the Partitions of Poland where Polish jurisprudence (Polish-speaking judiciary, Polish law faculties, and Polish bar) had been allowed to freely develop prior to 1918. Raised in this legal tradition had been Professor Franciszek Fierich, one of the main drafters of the Polish Code of Civil Procedure of 1930, who for decades taught Austrian civil procedure at the Jagiellonian University in Kraków, holding the posts of dean and rector on several occasions. He was also an ardent supporter of amicable courts and alternative resolution schemes for civil disputes, which was reflected in the Polish procedural codification of 1930.

**Advancement of Austrian ADR?**

The long tradition of the regulation of § 433 ZPO must be admired, even more so the fact that it has remained essentially unchanged, especially considering the widely noticed and oft-criticized instability of the Polish civil procedure rules. What is also important, in contrast to the contemporary Polish application for summons for a conciliation attempt – the praetor’s settlement was a popular institution from the very beginning, which was one of the reasons for extending the possibility of its conclusion in 1914. Gradually, however, its role in the Austrian private law system diminished and became infamous. This is because it has been employed to circumvent the tenant protection laws, famously broad in Austria, by forcing the tenants to sign a settlement resulting in early eviction. Notwithstanding the above, the praetor’s settlement remains a useful and practicable instrument (e.g. in spousal maintenance cases) due to its low costs – the court fee amounts to a half of a lawsuit fee, which in turn can amount to a significant sum (in Austria, in general, court fees are significantly higher than in Poland).

In view of the shortcomings of this Austrian form of an application for summons for a conciliation attempt, there have been strong arguments raised in recent years for extending the possibility of out-of-court settlements. For instance, in 2009 the Vienna Bar Association (Rechtsanwaltskammer Wien), in connection with the planned amendment of the Bar Association’s statute (Rechtsanwaltsordnung, RAO), proposed that attorneys should be able to conclude a settlement (Anwaltsvergleich) between themselves, which would – bar any further court approval – constitute a valid enforceable title. Presently, a notarized settlement is required for such an effect. This was a concept directly modelled on German legislation.

Under German law, an attorneys’ settlement is a special form of out-of-court settlement which in turn – just like in Polish law – is one of the nominate contracts, regulated in § 779 BGB. However, the attorneys’ settlement was regulated in a procedural statute: first in 1991 as in § 1044b ZPO and then by the Act of 22 December 1997 in §§ 796a through 796c ZPO. The purpose of introducing such a special, intermediary type of settlement was to relieve the courts of the caseload, and to speed up proceedings.

An attorneys’ settlement agreement must first of all meet the requirements for an out-of-court settlement as set out in § 779 BGB – and thus include a designation of the parties, the legal matter as between them and the claims arising therefrom, as well as the disputes or uncertainties concerning it and the means of resolving them; it must also include its effective date. Interestingly, the discussed instrument is void of the status of a court settlement as regulated in § 794(1)(1) ZPO, nor its equivalent – this is useful as it allows the settlement to be concluded even if the dispute has not yet been referred to court. Furthermore, it can be used to settle (in a modified manner) matters that have already been validly resolved in court. The main shortcoming of the German regulation, however, is that the Anwaltsvergleich requires court approval and an enforcement clause is issued by a court, which makes it a very rarely used instrument in practice.

The Austrian proposal, however, went further, in that it stated that attorneys should be able to conclude settlements between themselves which, without further court approval, would constitute an enforceable title. This idea is not only simpler but seems much more efficient in reducing formalities than the German solution. Simultaneously, as the settlement may only be entered with attorneys’ participation, the risk of abuse of law is significantly...

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37. Ibidem; see also F.X. Fierich, O obecnym zadaniu sądów sądowych dla spraw cywilnych, Kraków 1892.
38. P. Oberhammer, T. Donej, op. cit., 221.
39. See, for example, H. Kläring, Scheidungs-Ratgeber für Frauen (Wien 2015) 167.
40. In Austria, until the present days, the activities of the Bar are regulated by the Law of 6 July 1868, by which statutes for lawyers are established, RGBl 1868, No. 96.
lowered. The Austrian bar argued that introducing such a new ADR scheme would relieve the courts of their burden, reduce costs, and streamline the dispute resolution process. However, both legal academics and notaries actively opposed this idea, arguing that it would create a kind of parallel justice system (Parallelljustiz) and that it would equip attorneys with powers equal to those of notaries – who in turn had been the only ones who (by virtue of their profession) could draft legal instruments of the same force as court decisions.

As a result, the contemporary regulation of amicable dispute resolution in Austrian civil procedure is largely rooted in legislation from the monarchical times, one that due to historical reasons strongly overlaps with the Polish regulation. This is because the wording of § 204 ZPO remains unchanged, almost completely coinciding with Art. 231 § 1 of the repealed Polish Code of Civil Procedure of 1930, which is, in turn, a direct predecessor of the present Article 223 of the contemporary Code of Civil Procedure.

The conservatism of the Austrian regulation is also reflected in the reluctance to adopt the concept of mandatory pre-litigation settlement procedures. These are exemplified, inter alia, by the obligation to make a settlement attempt in tenancy cases before an administrative authority - the Schlichtungsstelle.

Conclusions and recommendations.

The limited framework of this article allows only for a brief outline of the Austrian regulation of pre- and out-of-court dispute resolution. The authors’ aim, however, was above all to familiarize the Polish audience with the general ideas of a system that is close to the Polish yet remains little known and is often treated with neglect. Polish scholars are much more inclined to refer to the French or German experiences. Meanwhile, the system of Austrian law, although nowadays binding on a relatively small area and remaining under strong influence of German law, shows numerous historical links with Polish legislation.

Having shortly outlined the historical development of out-of-court dispute resolution in Austria considering the Germanic legal tradition, and having described the two specific Austrian institutions, we may move to observe certain parallels with the Polish situation and its possible developments.

A comparison of the most characteristic ADR institutions in Austria reveals one significant similarity with the Polish system in comparing the pretorium settlement and the institution of a writ of summons for a settlement attempt. This may not be surprising. The common historical experience, which through the institutional development of the law and the direct influence of personally involved persons, resulted in recycling the shape of the institution of the pretorium settlement into the Polish civil process, is important in this respect. Unfortunately, both institutions, although useful for practice (albeit not fully in line with the intentions, as they often serve rather to circumvent rigid regulations), do not meet the objectives that should be realized, and which constitute the meaning of ADR solutions. They do not noticeably increase the effectiveness of the system, do not relieve the courts, and do not lead to greater confidence of citizens in the state and courts, including greater internalisation of decisions.

A significant difference, in turn, is the lack in Poland of permanent mediation offices similar to those in Austria. Nevertheless, it cannot be concluded that the Polish legislator chose a completely different solution. It rather followed the path of dispersing the mediation system and distributing the related responsibilities among individual mediators instead of concentrating them in organized offices. These, however, are only further manifestations of the informalization of the system - which does not, for example, require a legal education.

Another manifestation of the common history and development of the Austrian and Polish legal systems is, of course, their inclusion in the regulatory developments inspired, motivated, and induced by the European Union. It seems, however, that despite the emphasis placed upon out-of-court mechanisms of dealing with disputes, the legal systems of both countries are not steadily moving towards a position where ADR would play a much greater practical role. Sociological and historical analyses of both societies apart, what may be a simple solution advancing the practicality of extrajudicial resolutions?

In our view, the Austrian proposal to offer a much greater role to attorneys is a valid and good idea, and is perhaps one of the few real opportunities to at least partly heal the system and advance those goals that ADR should help facilitate. At least several arguments can be put forward in support of the proposal to equalize settlements entered into before qualified attorneys to court settlements. Firstly, attorneys are the ones who most often draft settlements, polish their terms and agree on their finer details. Thus, they are experienced in preparing settlement solutions, which oftentimes are later directly incorporated as court settlements. Secondly, the availability of lawyers is now much greater than it was just a few decades ago - both logistically and financially. Finally, it is difficult to see any supernormal dangers in the idea of giving lawyers the capacity to conclude settlements with the force of court settlements. Strong ethical (professional deontological codes) and practical (market consequences of dishonesty) considerations seem to be sufficient safeguards. The court’s control over the settlements is often illusory – the court often remains merely a formal stage in which the settlement text must spend some time before it is finally concluded. Moreover, the fact that this idea has been verified in practice in Germany – a country of itself knows as a haven of cautious legislation – and that it has not resulted in turmoil, nor has it demolished the enforcement system or the professional separation of notaries and attorneys, is convincing.

If we desire to make ADR schemes attractive, if we are wary that our societies are reserved and mistrustful toward the various extrajudicial mechanisms of dispute resolution, we believe that awarding the settlements made before...
attorneys a status equal to court settlements is a very important starting point.

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