ADR Practices in Switzerland

by

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I INTRODUCTION

1.1 As in several other European countries the resolution of conflicts is based in Switzerland upon a set of systems. In civil and commercial disputes **negotiation, mediation, conciliation, arbitration** and **civil proceedings** play their respective roles. (Besides, in matter of insurance, banking and travel contracts, problems or conflicts can be referred to **ombudsmen's offices).**

All these systems have their own spirit, objectives and methods, with their advantages and limits, too. Facing each other, they are rather in a situation of **complementarity** than of competition and sometimes they act in synergy.

In almost all civil and commercial matters, parties master their conflict and are therefore free to choose, subject to public order and to mandatory rules, the most appropriate system to settle it. And even when the law prescribes that a case shall be referred to civil procedure (for instance in divorce cases) resorting to conciliation, mediation and arbitration is not entirely excluded.

Selecting the most appropriate mean of resolution for a case, between and inside these systems may be a task as important as difficult. Therefore it is desirable that a dispute may move from a system to another, and at every step of the procedure[2].

1.2 Unlike the majority of European countries, Switzerland operates within a federal system. Since 1848 until now there are as many laws of civil procedure (CP) and laws on organisation of judiciary (OJ) as cantons (26), besides the federal laws. As far as ADR are concerned a short synthesis of these systems is here drafted, our country being a Microeurope in the heart of Europe. But in 2010 the Civil Procedure will be unified (SCP). At the moment the federal Ministry of Justice is preparing a draft Swiss civil procedure (SCP), which will be submitted to the Federal Chambers next year. It will contain provisions on ADR: conciliation, mediation and arbitration.

1.3 In almost all Swiss cantons preliminary judiciary conciliation is known since two centuries, arbitration since one, and mediation since a decade (in several cantons only).

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[1] © Judge of the Court of first Instance, president of the Conciliation Commission for Rent and Lease Matters, and Mediator admitted to the Geneva roll.

[2] That is one of the objectives of the Geneva legislation mediation.
Another example: judiciary conciliation is possible in first instance and in appeal in Canada, Belgium, France, Norway and in some Swiss cantons.

Distinction between mediation and conciliation

2.5 The Swiss Association of Judges for mediation and conciliation (Gemme-CH)[5] has attempted to distinguish between the two methods using the following definitions of Article 4 of its statutes:

> "By mediation is to be understood ... a formal process for managing communication, freely consented to by the parties, facilitated by a mediator – not a magistrate – who is independent, neutral and impartial, freely selected by the parties; a process[6] during the course of which the parties seek their own solutions".

It makes clear that mediation process is driven by the parties. The mediator typically takes a ***facilitative role*** and the opportunity to reach a settlement is placed in the hands of the parties. The mediator has no power: either to impose a final decision or to suggest a possible solution (except if he or she is required to).

> "By conciliation it is understood ... an informal method for resolving lawsuits, which may be obligatory or voluntary, conducted by a conciliator – a magistrate – who is independent, neutral and impartial; a method[7] during the course of which the conciliator may suggest or propose a solution to the parties, if they have not reached an agreement by themselves".

Thus the judiciary conciliator traditionally adopts an ***evaluative approach*** to settlement, based on facts and law. He or she, too, has no power. Nothing hinders him from preferring the facilitative approach: the tools of mediation (new techniques of communication and of negotiation on a win/win basis) – are welcome too in conciliation, and the examples of their Canadian, Norwegian and other European colleagues are stimulating. But it implies that he or she should be trained and educated in this approach, which is not the case for a vast majority of Swiss judges.

In other words, as in other countries, mediation and conciliation can overlap (see Annexes I and II).

The terms chosen for the subject of this afternoon (A chaque pays sa meilleure pratique et à chaque pratique son meilleur pays) is a rather interesting provocation. They should be confronted with the wise opinion of our President, Mr. Guy CANIVET, 1st president at the Cassation Court, Paris, who writes :

"Il n'y a pas de hiérarchie ni de prévalence entre les divers modes de règlement des litiges...

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[5] For further information see par. 5.2.
[6] Mention of confidentiality is lacking in this definition.
[7] Mention of confidentiality is lacking in this definition.

- unlike French, Belgian and Italian legislations, there is no delegation of mediation by the judge, who **proposes** it to the parties[9];

- therefore there is no judiciary control on mediation process as such, neither on the substance nor on the formal aspect (delay, cost, etc).

The main characteristics of Geneva's new legislation that notably affect the laws on civil procedure and the organization of the judiciary, are as follows:

a) *Reciprocal non-interference between civil proceedings and the mediation process*: judges and mediators act in their own worlds, with their own respective methods and criteria, without interference or control by one with respect to the other.

b) *Legitimacy of the mediation process*: mediation for parties involved in civil proceedings has now received legal recognition, thus granting legitimacy to the process. The judge can now suggest it in all cases where it appears to be appropriate, and the parties in civil proceedings can resort to it and be encouraged to do so by their attorneys.

c) *The links* between mediation and civil proceedings are facilitated by the resolution of certain procedural issues that arise from the passage from one mode of dispute resolution to the other. This is at all stages of civil proceedings, in all courts and in all civil and commercial matters, including labor tribunal and rents and leases cases. Ratification of a settlement agreement can be achieved by relatively simple and flexible solutions.

d) *The codification of rules of ethical conduct* confirms the guarantee that the parties receive from the process of mediation (confidentiality) and the necessary qualities of a mediator (independence, neutrality, and impartiality).

e) *The framework of a flexible infrastructure* is apparent in the rules for registration onto and deletion from an official list of people and institutions involved in mediation, and the provisions regarding professional ethics and disciplinary sanctions. A committee is set up to give the cantonal authorities recommendations on all of these matters.

The eurocompatibility of the text with Recommendation No R (98)1 of the Committee of Ministers of the States of the Council of Europe on family mediation and Recommendation No Rec (2002)10 on mediation in civil matters was systematically tested [10].

3.3 In the perspective of the SCP the Association Gemme-CH has presented to the Ministry of Justice a proposal based on the Geneva model, with some other new ideas: regulations on mediation clauses[11], on limitation period, on the duty of confidentiality ...

(http://www.secretantroyanov.com/gemme/doc/GEMME_Suisse.pdf)

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[9] On the parties' initiative too (see par. 150-152 of opinion No 6 (2004).
[10] Semaine judiciaire, 2005, No 5, Volume II, pages 125-139.
[11] Based on the Belgian code, article 1725.

Other basic items.

The guide, elaborated by mediators, also gives information on the mediation process, the mediator's role, the lawyer's role, the advantages of mediation, cost and legal assistance. It increases public awareness of the existence and utility of mediation.

Legal aid is also available for mediation in Geneva.

Confidentiality

Without this key principle, mediation would be denatured, especially if the mediator would be questioned later in an arbitral or civil proceeding.

One of the consequence of this principle is that the third party – as in mediation as in conciliation process – is never the trial judge, in conformity with article 161 of opinion No 6 (2004), CCJE.

Therefore the GPC obliges the mediator to keep secret all the facts he learned as a result of mediation process and any action he took, participated in or witnessed and without limitation of time.

The same article provides the parties may not reveal anything that was said before the mediator.

In this oath the mediator swears to preserve the secret nature of mediation and its infringement could lead to disciplinary and penal sanctions.

In the other cantons the duty of confidentiality can be mentioned in mediation agreements, before the mediation process. But in Switzerland the question of the validity and enforceability of this duty by the Court is not settled now, as the question of its scope. That will hopefully be the case with the SCP.

Limitation periods

General limitation periods are governed by the Swiss obligations code (article 134 CO). For the moment mediations implemented spontaneously by the parties will not suspend the limitation period, except specific precisions on this matter in the preliminary mediation agreement.

Enforceability

a) of settlement agreements

The final agreements may be enforced either by means of court trial (ratification/homologation) or in the form of an arbitration award.

According to the GCP, the judge cannot modify the contents of the settlement agreement submitted to him or to her for ratification, subject to public order or mandatory rules.

This problem will be hopefully governed by the future SCP.

Its members have the practices of judiciary, and/or conciliation and/or mediation.

5.3. The following institutions propose an education:

- CEFOC, Centre d'études et de formation continue, Geneva
- Mediation commission (FSA), Bern
- Groupement Promediation, Geneva
- Institut universitaire Karl Bösch, IUKB, Sion
- University of Geneva, Law Faculty
- University of St Gall, Law Faculty
- University of Zurich, Law Faculty
- WIPO Arbitration and Mediation Center Geneva.

CONCLUSIONS

Since a decade conventional mediation plays its new complementary role among ADR in Switzerland, in particular alongside a generally efficient judiciary conciliation system, and - in some fields - alongside ombudsmen's offices.

The Geneva legislation and the future SCP will offer new perspectives, the judges acting as promoters of mediation when it appears appropriate for the case and for the litigants.

It is generally admitted in judiciary's, lawyers and mediators circles that mediation is an answer to the need to expand and diversify the application of justice, and to the desire of people and companies to regain control and responsibility for solving their dispute by themselves. Therefore the mediation process as such shall remain in the hands of free and responsible parties, and will not be governed by the legislation.

Thus decreased pressure on the courts may be the effects of mediation, not its aim. ADR means rather **amicable** or **appropriate** than alternative dispute resolution in Switzerland.

It must also be stressed – but that is not specific to our country – that mediation has a particular place among ADR systems. Unlike ombudsmen's office, conciliation or arbitration, mediation is not supposed to solve a legal dispute as such, but to help the parties to find between them a creative solution based on their common interest (win-win).

The GCP illustrates the feasibility of links or moves between mediation respectively and judiciary conciliation or civil procedure. By analogy, such links are also conceivable between mediation and arbitration.

The GCP hinders the judge and the mediator from intervening in each other's sphere (with some exceptions in matter of ratification), which contributes to preserving confidentiality.

Annex I - a

Facilitation / Evaluation

Conventional Mediation (CM)

Traditional CM

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Facilitation

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Person :

- emotions
- needs
- interests

Solution based on the parties' Future interests (even if outside of the framework of the legal conclusions of the litigants)

The third party needs to master facilitation's techniques

Other CM

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Evaluation

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Facts and law

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Legal solution
Resolution of a past dispute (within the framework of the legal conclusions of the litigants)

The third party needs to master the law

Judiciary Conciliation (JC)

Traditional JC

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Evaluation

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Facts and law

New JC

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Facilitation

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Person :

- emotions
- needs
- interests

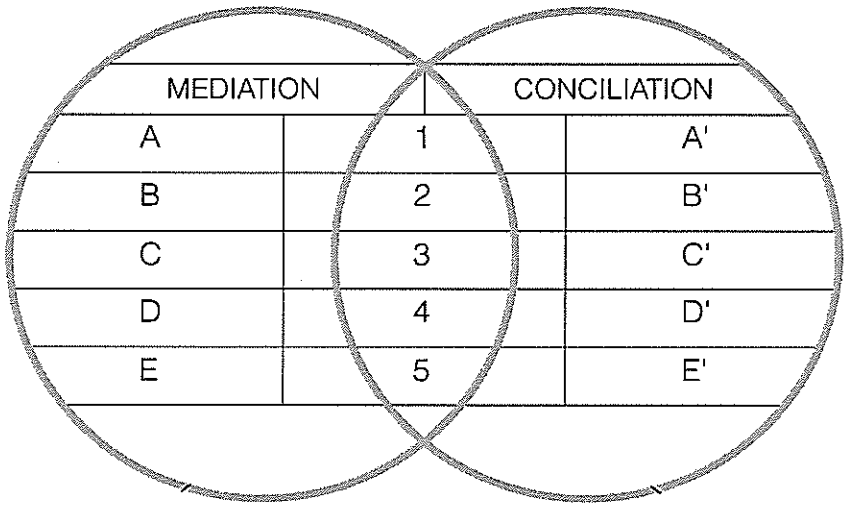
Solution based on the parties' future interests (even if outside of the framework of the legal conclusions of the litigants)

The third party needs to master facilitation's techniques

Annex II

ADR Family :

The Twins
Comparison between conventional mediation and judiciary conciliation (in their traditional approaches)



Common principles :

1. No power
2. Independence, Neutrality, Impartiality
3. Confidentiality
4. Efficacy, Quickness, Reduction of costs
5. Dialogue

Differences :

A) Concentration on persons
B) No legal frame
C) Formal process
D) Solution from the parties
E) Free choice of the third party

A') Concentration on facts
B') Legal frame
C') Informal process
D') Solution from the third party
E') No choice of the third party