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Mediation in the new Swiss Federal Code of Civil Procedure: a significant step towards ADR?

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It has been nearly a year since the Federal Code of Civil Procedure ("CCP") has entered into force in Switzerland (text available, in French, at: http://www.admin.ch/ch/f/rs/c272.html). The purpose of this post is to briefly describe how mediation is now legally embodied at the judicial level and whether this contributes to the development of mediation in Switzerland.

First of all, it must be recalled that due to the legal system prevailing in Switzerland – the federalism -, the civil procedure was within the sphere of competence of the "cantons" until the end of 2010. This meant that each canton had its own rules of procedure, irrespective of the fact that the law on the substance is generally the same for all cantons (e.g. civil and contract laws which are governed by the Civil Code and Code of Obligations, respectively).

With a view, inter alia, to regulate the civil procedure more efficiently, it was decided to enact a uniform code. The spirit of the lawmakers was to give "priority" to amicable settlement of disputes. Emphasis was therefore made on conciliation and, to a certain degree as explained below, mediation.

In the new Federal Code of Civil Procedure mediation is now governed by a series of rules that sets the basis of mediation, unknown – except in Geneva – in most previous cantonal codes of civil procedure.

In this respect, the principle is that judicial conciliation (i.e. conciliation made by the Judiciary) has precedence over mediation. As a general rule, legal proceedings cannot be undertaken without a prior conciliation attempt. However, if the parties to legal proceedings jointly so request, mediation takes place instead of conciliation (Art. 213 CCP).

The Code does not define what mediation is. It does provide, however, that mediation is "independent of Court proceedings" (Art. 216 para. 1 CCP). This is not without any substantial effect as the development of mediation as explained below.

In addition, it is important to point out that, even if mediation does not take place in Court or within the Court proceedings, mediation is clearly considered as a mode of settling disputes that is considered as an alternative to judicial proceedings.

But how, then, can mediation take place in this context?

Apart from the situation described above where the parties can op-out for mediation instead of conciliation when commencing legal proceedings, the CCP provides that “the Court can recommend mediation at any time” (Art. 214 para. 1 CCP). Likewise, parties in pending proceedings can jointly apply to the Court for mediation at any time (Art. 214 para. 2 CCP). Once mediation takes place, the Court proceedings are stayed until one of the parties revokes the application or informs that the mediation has been terminated (Art. 214 para. 3 CCP).

It is worth noting that the Court’s powers are very limited towards mediation. The Court can only propose, suggest or draw the attention of the parties to the possibility of resorting to mediation. At least, as legal scholars suggest, the Court should inform the parties about such an opportunity. As a matter of principle, the Court cannot, under Swiss Law, order mediation. There are nevertheless exceptions, in particular when measures or actions need to be undertaken to protect children in a related Court proceedings (mainly in case of separation or divorce proceedings).

The fact that that Court ordered mediation does not exist Switzerland is based on the principle of party-autonomy. Such a principle is embodied in Article 215 CCP which provides that “the organization and conduct of the mediation is left to the parties”. The Judge does not interfere in the mediation process: he does neither appoint the mediator nor prescribe how the process must take place. It is the duty of the parties, based on their free will, to agree on a mediator and, generally, to rely on the latter for the organization of the mediation. Sometimes, especially in commercial matters, the parties designate (in their contract or when the dispute arises) an organization such as a Chamber of Commerce to assist them in the setting in motion of the mediation process, namely to appoint a mediator on their behalf if they are unable to do so.

Therefore, the rules of procedure that are embodied in the CCP only governs the relation between judicial proceedings and mediation as a whole. Party-autonomy is based on the fact that mediation would probably not be properly be performed if not fully and entirely agreed by the participants thereto.

Party-autonomy is also expressed at Article 216 para. 1 CCP which provides that mediation is independent of Court proceedings. This means, in particular, that the mediator has not duty to report to the judge on what happened in the mediation process. This same provision further provides that mediation is confidential and that parties’ statements cannot be used in Court proceedings (Art. 216 para. 2). However, the parties can jointly request that the Court ratify the agreement they have reached in mediation (Art. 217 CCP).

Finally, the CCP (Art. 218) provides that the parties bear the mediation costs, except in non-monetary matters involving children where parties lack necessary financial means and mediation was ordered by the Court. Cantonal law is reserved in respect of costs; in Geneva for instance, parties may seek State (Judiciary) financial assistance for mediation proceedings taking place both within the judicial system and outside the Court.

Where do we stand therefore now, since the enactment of the CCP?

In Geneva, for example, the community of mediators set up an information-desk open twice a week where people interested or concerned by mediation can seek necessary information about mediation (see website, in French, at http://www.permanence-info-mediation.ch).

As far as the Judiciary is concerned, development of mediation has not yet been significant. In some cantons, it is so because mediation is not really known and even non-existent in practice.

But more generally, it is the opinion of the author of this post that whilst mediation is legally recognised in the CCP in one hand, the principle of party-autonomy that is established therein and the further principle whereby mediation is independent from the Court on the other hand, do not favour mediation.

Litigants are not really encouraged to consider mediation in this context. Moreover, the fact that conciliation proceedings enjoy now more consideration from the CCP and that significant resources (financially, in time and staf) have been devoted thereto, Judges generally do not see what added value could bring mediation in case a judicial conciliation attempt fails.

The community of mediators still have some work in the near future: to continue informing people, lawyers, magistrates and any other persons concerned by a conflict on what mediation is and what it can bring to them.

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