Kluwer Mediation Blog

Mediation and the Swiss Courts: cause and remedies for lack of success

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In a previous post, I had briefly described how mediation is now embodied in the Swiss legislation and whether this may contribute to its development in Switzerland.

Regarding mediation within the Judiciary, I had mentioned the lack of significant development in this field. I identified two main causes.

The first one is the principle of party autonomy established in the Swiss Code of Civil Procedure (Art. 216 CCP: see text in French at http://www.admin.ch/ch/f/rs/c272.html) pursuant to which mediation is considered as being independent from the Courts (Court ordered mediation being thus not known in Switzerland) and does only vest with the free will of parties interested therein.

Second, judicial conciliation has precedence over mediation for which litigants may opt out (Art. 213 CCP) but rarely do so in practice.

A discussion that took place between Judges and Mediators a while ago in Geneva, for example, evidenced the lack of understanding by the Judiciary of what mediation really is, especially as compared to judicial conciliation.

In order to promote mediation in Geneva, accredited mediators there have set up an information-desk ("*Permanence Info-Médiation*": http://www.permanence-info-mediation.ch), sponsored by the Geneva Bar, where people can obtain information about mediation. This desk is open half a day twice a week but, unfortunately, few people show up; and judges do not invite litigants to visit such a desk… .

How could this unfortunate situation be remedied?

One interesting initiative is the checklist that the Mediaton Chamber of the Bar of the Canton of Vaud (OAV) prepared for juges (see: http://www.mediation-oav.ch/images/uploaded/file/Check-List-Juge-tableau.pdf).

Such a checklist aims at enabling judges to identify, in civil and commercial matters, situations for which mediation may be appropriate given the nature of the dispute or the parties' relationship. Such a document also deals with the Court ratification of settlement agreements and with some procedural particulars regarding family law.

As regards the nature of the dispute, a list of circumstances that may favor the resort to mediation is established as follows:

– when the outcome of Court litigation is uncertain (*e.g.* the necessary taking of evidence of essential elements of the dispute);

– in case of discrepancy between the judicial truth and reality on facts for lack of evidence (*e.g.* sexual harassment without witnesses);

– the dispute has a high degree of emotional component (*e.g.* probate and will disputes);

– judicial proceedings only constitue the revealed part of the iceberg (*e.g.* partners having a different conception of the management of their business);

– the dispute may hide another one (*e.g.* claim for alimony where the financial issue reveals a disagreement on the professional orientation of the child concerned);

– the judicial outcome may impact the future of the parties' relationship (*e.g.* interpretation of a provision of a commercial contract);

– the dispute requires restoring the communication between the parties in order to ensure the durability of the solution (*e.g.* community, family and partnership disputes);

– when there is a strong probability of recurrence of the dispute (*e.g.* condominium disputes);

– the judge perceives the interest to encourage litigants to adopt a more constructive and adequate behavior in a safe environment (*e.g.* intra-family disputes);

– the judge realizes a disproportion between the litigation costs, duration of the proceedings and the issues at stake (*e.g.* dispute between neighbours; "in principle" dispute).

However, in instances where issues appear to be fairly delimited, facts are straightforward, evidence is given or the position of one of the parties appear well founded, mediation may not be recommended; the same is for disputes that involve fundamental and divergent views on issues of moral, ethical, religious or philosophical content and the the parties had already attempted to address them among themselves or when the dispute must be solved within a certain time-limit failing which a right may be lost.

As regards the parties' relationship, mediation may be recommended when:

– the parties have an interest in pursuing their relationship after litigation;

– when the parties' relationship overflows the frame of the litigation (family, business, community relationships);

– when it is in the interest of the parties to save the quality of their relationship.

To the contrary, when there is a lack of willingness to negotiate or to start mediation despite the information provided to that effect, when there is strong disparity in the negotiation ability of one party (for medical reasons for instance) or when the conflict has reached a high degree of intensity incompatible with the mediation process (physical violence for instance), mediation cannot be

contemplates.

Some neutral elements are also identified in the checklist, such as:

– some disparity between the parties;
– different cultural origins;
– foreign language and understanding problems;
– counsel behavior;
– time factor (fear of dilatory tactics).

Regarding the settlement agreement, the said checklist points out the possibility for the parties to seek ratification in Court and the limited powers of the judges in this respect to review said agreements: the judge only verifies that the agreement is not disproportionate and is not contrary to mandatory laws (Art. 56 CCP).

In family law matters, judges are encouraged to recommend mediation, especially in case of divorces where the parties do not agree on all elements thereof or where the divorce is filed by one party only.

Such a checklist, with a brief explanatory note, seem to be a very useful tool to be submitted to the attention of judges, especially in Geneva. The elements contained therein are well identified, especially those pertaining to the relationship of the parties.

Another tool may be is the “double summons” that is sent by some French Family Courts to parties: the first one is the invitation made to the parties to appear in Court in order to be heard, the second to attend a meeting at the mediation information desk in order to receive information about mediation. Why not, therefore, using this method here?

All efforts that could be made to this effect will however prove to be efficient only when judges will understand and accept the real benefit for the parties to consider mediation in certain circumstances.

This means that judges must preliminary understand the basic concepts and processual principles of mediation. This could be achieved through proper – at least one day – training offered to them.

Being myself a mediation trainer, I participated on two occasions to such training, delivered to judges in Geneva. The success was mixed: most of the people attending were deputy judges and most of them were advocating conciliation… .

The mediation community in Switerland becomes more organized these days, among others notablt through a task force named “Coordination Switzerland” (see : http://www.mediationschweiz.ch/cms/fr/accueil.html). It should therefore continue with its efforts to promote mediation in order to achieve this paradigm shift in dispute resolution.

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