

THE RISE OF MEDIATION IN EUROPE AND SWITZERLAND

AND THE ROLE OF JUDGES

(summary of the French text)

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As in several other European countries disputes can be resolved in Switzerland using a broad range of dispute resolution procedures. In civil disputes, negotiation, mediation, conciliation, arbitration and civil court proceedings play their respective roles. (In addition, in matter of insurance, banking and travel contracts, complaints or disputes can be referred to ombudsmen's offices). All these systems have their own purpose, rules and methods, with their own advantages and limits, too. They are complementary rather than in competition with one-another and can be used synergistically.

In almost all civil matters, the parties are responsible for resolving their disputes themselves and are therefore free to choose, subject to any public policy restrictions or mandatory rules, the most appropriate system to settle them. It is the judge's duty to help them in making this choice (Guy CANIVET, *Art et Technique de la mediation*, Litec, Paris 2004, p. 202). Even when the law provides that a case must be referred to civil court proceedings (for instance in divorce cases) resorting to conciliation, mediation or arbitration is not entirely excluded. Selecting the most appropriate means of dispute resolution for a case, between and within each of these options may be an important and difficult job. Therefore it is desirable that a dispute be free to move from one system to another, at any stage of proceedings.

The specific role of mediation within the range of possible dispute resolution means should be stressed. Whereas traditional conciliation (assessment / evaluation), arbitration and civil court proceedings share the common goal of resolving the matter based on legal norms, the purpose of mediation is completely different. By re-establishing dialogue between the parties, the mediator helps them to find by themselves their own solution, based on their mutual (subjective) interests (“win/win” solutions).

Thus, mediation (facilitation) operates on a different level. It has no hierarchy of standards.

Though insufficiently explored and used, mediation exists in Switzerland, as in several other countries. It is clearly on the rise and is unavoidable. In this context the possible role of judges in promoting and recommending mediation should be considered further.

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