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AMICABLE DISPUTE RESOLUTION OR LITIGATION:

New Priority or New Approach?
What Future for Mediation in Switzerland?

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MEDIATION IN EUROPE
Present challenges and future developments

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AMICABLE DISPUTE RESOLUTION OR LITIGATION

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I. INTRODUCTION

1.1. Dispute resolution stands in Switzerland as in several other countries upon an implicit set of systems[2]. In civil and commercial disputes negotiation, mediation, conciliation[3], arbitration and civil proceedings are supposed to play their respective roles (besides, in matter of insurance, banking and travel contracts, problems or conflicts can be referred preliminarily to ombudsmen's offices).

1.2. However till now litigation (civil procedure and arbitration) holds in practice a prominent place, in the mentality and in the conduct of the people, that is in our judiciary culture; this statement being nuanced by a rather high rate of success of preliminary judiciary conciliation in several Cantons[4].

But where the rate of conciliations is poor, like in Geneva, the blind, systematic and automatic use of litigation will soon lead to its failure: in Geneva with one lawsuit for four residents, babies included.

1.3. Till now, too, Switzerland looks like a Microeurope, due to operating a federal organization[5]. Like in a laboratory, there are a vast variety of systems[6], whose good or bad consequences may be instructive. If it is theoretically admitted that dispute resolution systems have their own spirit, objectives, methods, advantages and limits too, the kind

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[1] © Judge, Conciliator, Mediator, Geneva, Secretary General of GEMME Switzerland (Gemme-CH).
The author expresses his gratefulness to Sandra VIGNERON-MAGGIO-APRILE, Dr jur., for having updated with him a presentation made at Sochi round table, organised by the CoE and the Supreme Arbitration Court of the Federation of Russia, November 2005.

[2] Regulated respectively by law and/or associations rules.

[3] As the Swiss conciliators are used to give to the parties their opinion, advise, or solution, an approach which is not compatible with the Swiss concept of mediation, we kept purposely this distinction.

[4] Switzerland is formed from 26 Cantons.

[5] Since 1848 until now, there are as many codes of civil and penal procedure, and laws of judiciary organisation, as Cantons, beside the federal law. The two Chambers of the Swiss Parliament (the National Council and the Council of the States) are examining two unified federal draft codes on penal and civil procedure.

[6] In almost all Cantons, preliminary conciliation exists since two centuries, arbitration since one, and in a few of them mediation since around twelve years (cf. Gemme-CH, Civil Mediation, Cantonal practices, Fribourg, Oct. 2006).

of relations they live facing each other is sometimes questioned: are amicable resolution systems complementary or in competition with litigation?

However that may be, this situation will change, likely January 2010, with the unified Federal Code of Civil Procedure (FCP), the judiciary organization remaining in the competence of the Cantons.

II. PRESENT CHALLENGES AND FUTUR DEVELOPMENTS

2.1. Thus the present unification exercises (penal and civil procedure codes) could be the right, appropriate and exceptional opportunity in Switzerland to debate on essential points: the future of justice in the beginning of the XXI century, its place, its forms, and its means; precisely, on the kind of relations between amicable dispute resolution and traditional litigation.

For the moment debates remained coldly technical, focused on procedural modalities and choices, at the stage of a Committee for Legal Affairs working closed doors.

However, the Federal Council[7] declares in presenting its official draft (Bill) dated 28th June 2006 (p. 20):

> *"Amicable resolution has priority".*

It expressed for the first time the point of view of the highest level in favour of amicable resolution. It indicates a possible change of culture or, at least, it might be a decisive signal for the future Swiss judiciary life. It has no hierarchical meaning, just pointing on the advantages of ARDR for the parties (p. 20):

> *"It is not because ADR alleviate the burden of the Tribunals, but because - in general - consensual settlements are more lasting, stronger therefore more economic since they can take into account elements that a Tribunal may not keep".*

2.2. This declaration is more especially important as the first draft of a Code of Civil Procedure, prepared by experts three years ago, deliberately left aside mediation considering that legislate on this matter was useless because the mediation process belongs to the parties. The first draft has granted so few attention to ADR that one can wonder if the CoE key Resolutions were known to the experts[8].

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[7] In Switzerland, the Federal Council is both head of State and Gouvernment.

[8] By key Resolutions, we understand: Rec(1998)1 on family mediation; Rec(2002)10 on mediation in civil matters; Opinion n°6 (2004) on fair trial within reasonable time and judges' role in trial taking into account ADR; Conclusions of the first European Conference of Judges on "Early settlement of disputes and the role of Judges" 24-25 Nov. 2003.

In response, the Swiss group of magistrates for mediation and conciliation (Gemme-CH) took the initiative to present to the Swiss Ministry of Justice its own project relating to mediation, which is anchored precisely on these key Resolutions and inspired by comparative law and Geneva legislation. Our proposal was supported by the Swiss Chamber of Commercial Mediation (SCCM) and the Swiss Mediation Federation (SMF) in June 2005, with a shorter version as an alternative[9].

2.3. The title II of the FDCP on mediation contains now six articles:

210 Mediation instead of the preliminary conciliation

211 Mediation during the civil procedure

212 Organization of mediation process

213 Confidentiality

214 Ratification of mediation settlement

215 Costs

Besides, the draft contains also auxiliary provisions (for instance art. 45 recusation of a judge having acted as mediator; art. 163 right for a mediator to refuse to testify; art. 292 Exhortation of the parents to attempt a mediation process in divorce cases).

The FDCP salient point is the combination between the compulsory preliminary judiciary conciliation (art. 194) and mediation (art. 210) whereby the parties may and should choose mediation if they renounce to preliminary conciliation. This original system would give a good impact for the development of mediation. Unfortunately, its scope is notably limited by many exceptions (art. 195) and exemptions (art. 196) from the obligation to go through preliminary conciliation (for instance in family and in intellectual property disputes).

2.4. As the general economy of the FDCP on mediation doesn't reflect enough the idea that *"Amicable resolution has priority"*, Gemme-CH addressed to the Committee for Legal Affairs of the Council of the States some amendments, with comments, in order to make the FDCP broader, more effective, and in conformity with the CoE key Resolutions[10].

In January 2007, the SCCM, the SMF and the Swiss Chambers of Commerce and Industry (SCCI) supported most of our amendments.

[9] http://www.secretantroyanov.com/gemme/doc/GemmeSuisse.pdf
[10] http://www.gemme.ch in documents

Despite this alliance, the Committee for Legal Affairs informed by two laconic press releases that provision on mediation was rejected from the Code of Penal Procedure (because it could be too expensive for the State) and soon after, that the Title II on mediation in the FDCP was not retained (because it was not necessary, the mediation belonging to the parties).

Thus, our Federal Council was twice disavowed.

2.5. The draft is being submitted to the examination of the plenary of the Council of the States. Later, it will be transmitted to the Committee of Legal Affairs of the National Council, which will probably examine it in the end of this year.

The fate of mediation as long as the FDCP is concerned will be known probably next year.

III. DEFINITION of MEDIATION and OTHER ADR

a. Statutory definitions

3.1. There is neither definition of mediation in GCP/GOJ, nor in the two successive drafts of codes of penal respectively civil procedures.

On the other hand there are many attempts of definitions in the Swiss topic literature[11].

3.2. Although compulsory preliminary judiciary conciliation[12] was introduced in almost (23) civil procedure codes, they give neither a definition of conciliation nor a description of its process.

Even leading commentators do not pay substantive attention to these questions.

Judiciary conciliation concept is ambiguous in many Cantons[13]:

a) in the preliminary judiciary conciliation, the conciliator (a magistrate or a layman, alone or in a bi-or tripartite composition[14]) is no longer in charge of the file for the next procedural steps: hearing

[11] Cf BROWN-BERSET, Dominique, La médiation commerciale, un géant s'éveille, in RDS 2002 p. 319 ff; CHENOU Martine *et al*., La médiation civile ou métajudiciaire, SJ 2003 vol. II p. 271 ff; DUSS-VON WERDT, Joseph, Homo mediator, Geschichte und Menschenheit der Mediation, Klett-Cotta, Stuttgart, March 2005. A selected ADR bibliography is available in www.gemme.ch.
[12] Before the trial or as its first step.
[13] MIRIMANOFF, Jean, Mort ou renaissance de la conciliation judiciaire en Suisse?, in RDS n°5, 2004.
[14] In matters of labour respectively rent and lease conflicts.

and deciding, which is in conformity with article 161 of the opinion No 6 (2004). The same system exists in the FDCP.

b) in several cantonal codes, the judge in charge of the case may – or must – conciliate the parties in any circumstances, which is contrary to the opinion No 6 (2004). Nevertheless this concept is reflected too in FDCP (art. 122 al. 3).

3.3. Until now ombudsmen's offices, as private institutions, are not regulated by law.

3.4. All procedure codes contain chapters or provisions on arbitration, an institution frequently used in civil and commercial disputes, which presents however similar disadvantages (cost, duration, complexity) as civil proceedings. It is also the case in the FDCP.

b. Distinction between mediation and conciliation

3.5. The Swiss Association of Judges for mediation and conciliation (Gemme-CH)[15] has attempted to distinguish between the two methods using the following definitions in 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[16] during the course of which the parties seek their own solutions".*

Similar definition is given by the rules of the SCCI (see here after IV. 4.2):

> *"Mediation is an alternative method of dispute resolution, whereby two or more parties ask a neutral third party, the mediator, to assist them in settling a dispute or in avoiding future conflicts. The mediator facilitates the exchange of opinions between the parties and encourages them to explore solutions that are acceptable to all participants. Unlike an expert, the mediator doesn't offer his or her own views nor make proposals like a conciliator, an unlike an arbitrator he or she doesn't render an award".*

It makes it clear that mediation process is driven by the parties. The mediator typically takes a ***facilitative role***; the opportunity to reach a settlement is placed in the hands of the parties. The mediator has no power: neither to impose a final decision nor to suggest a possible solution (except if he or she is required to).

[15] For further information see par. 6.2.
[16] Mention of confidentiality is lacking in this definition.

> *"By conciliation is to be 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*[17] *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 or her 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[18].

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

IV LEGAL FRAMEWORK (Mediation)

4.1. **Legislations in force (Geneva; GCP) and draft unified federal code of civil procedure (FDCP)**

4.1.1. Statutes and procedural rules.

According to the existing legislation, among the 26 Cantons, Geneva only until now[19] has adopted specific rules on civil mediation. The Geneva legislation modifies the civil procedure (GCP), judiciary organisation (GOJ), and other cantonal laws.

In a next future, as indicated, the cantonal codes will be replaced by a unified federal code.

The Geneva legislation was elaborated by a Committee of civil judges acting in close cooperation with mediation institutions, which explains the difference between this system and others:

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[17] Mention of confidentiality is lacking in this definition.

[18] HEIERLI, Andreas, Mediation und Gerichtbarkeit, Nachdiplomstudium Mediation an der Fachhochschule Argau, ergänzt Juni 2003.

[19] Some, like Fribourg and Glaris, have preferred isolated and limited provisions on mediation in their Constitution or Codes. Other, the majority, have none. See note 6.

- the judge proposes to the parties to amicably settle their dispute through civil mediation, whilst his or her French, Belgian or Italian colleagues delegate the dispute on a voluntary basis[20];

- therefore there is no judiciary control on mediation process as such, neither on the substance nor on the formal aspect (delay, cost, etc), whilst formal aspects of mediation are regulated by the law in the above mentioned situations.

The law was unanimously adopted by the Geneva's Parliament, a rather rare event.

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

a) Reciprocal non-interference between civil proceedings and 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 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 and the provisions regarding professional ethics and disciplinary sanctions. A committee is set up to give the cantonal authorities recommendations on these matters.

[20] On the parties' initiative too (see par. 150-152 of opinion No 6 (2004).

The eurocompatibility of the text with CoE Recommendation No R (98)1 on family mediation and Recommendation No Rec (2002)10 on mediation in civil matters was systematically probed[21].

As already seen, in the perspective of the FDCP, 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[22], on limitation period, on the duty of confidentiality …[23].

The FDCP retains also (art. 210 ff) the concept of proposal, whereby mediation process keeps its autonomy. In Switzerland, there is no difference between conventional and court referred mediation in this respect.

4.1.2. Mediability and suitability of mediation

The legal concept of mediability relates – as in the case of arbitration – to whether or not the subject matter of the dispute may be lawfully submitted to mediation.

On the other hand the practical concept of suitability relates to whether or not a dispute is "*deemed by its nature to be appropriate for mediation*"[24]

a) Subject to public order and mandatory rules, there is no limitation of the scope of application of mediation and no limitation at all for commercial disputes. Neither in Geneva law, nor in the law of other European countries such as France (1995), Great Britain (1999), Austria (2004), Italy (2004), Belgium (2005) whereas other countries prescribing mediation for specific cases: Portugal (2001) for small cases, Hungary (2001) for some civil cases, Ireland (2004) for commercial cases[25]. (For other countries there is – as far as we know – no prohibition to commercial mediation). It should be mentioned that in the FDCP there are unexplained and unjustified exceptions (art. 195) and exemptions (art. 196) which limit the material scope at the preliminary stage of the procedure, for matters (like family and industrial property) for which mediation is especially appropriate.

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[21] MIRIMANOFF, Jean, L'eurocompatibilité de la loi sur la médiation civile du 28.10.2004, SJ 2005 vol. II p. 125 ff.
[22] Based on the Belgian code, article 1725.
[23] http:///www.secretantroyanov.com/gemme/doc/GEMME_Suisse.pdf
[24] Article 71 A GCP.
[25] SINGER Jayne, MCKENNA Cameron, The EU Mediation Atlas; practice and regulations, CEDR, 2005 – Such kind of limitations are not specifically mentioned in the above mentioned Recommendations.

b) It is more difficult to determine whether or not mediation is appropriate for a concrete case: based on practice and experience, organisations such as CEDR solve in London, CMAP in Paris, or the French section of GEMME, have drafted guides or guidelines.

Nominated by the Geneva government, the Committee in matters of civil and penal mediation has recently presented a “Practical guide for civil mediation” which tries to answer simply and shortly some basic questions on mediation, and among them when is mediation appropriate (with 8 examples) and when not suitable (with 5 examples).

This guide is available in English, French, German, Italian, Spanish, Russian, Polish, Portuguese and Greek[26]. The guide, elaborated by mediators, also gives information on the mediation process, the mediator’s role, the lawyer’s role, the advantages of mediation, as well as cost and legal assistance. It increases public awareness on the existence and utility of mediation (see par. 141 of opinion No 6 (2004)). This document is available in an electronic form for each judge during his or her hearing, with an official list of mediators, so that he or she can give and provide basic information on mediation process when he or she proposes it to the parties.

4.1.3 Other basic items.

Legal aid (see par. 142 of opinion No 6 (2004)) is also available for mediation in Geneva. It will be limited in the FDCP to the cases concerning children (art. 215 al. 2).

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 – should never be the trial judge, in conformity with article 161 of opinion No 6 (2004).

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.

[26] http://www.geneve.ch/tribunaux/pouvoir-judiciaire/mediation.html and http://www.gemme.ch

In taking his or her oath, the mediator swears to preserve the secret nature of mediation and its infringement could lead to disciplinary and penal sanctions (GOJ, art. 161C).

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.

In the FDCP, this point is compendiously evocated (art. 213 al. 2) and violation deprived of sanction. This bill doesn't deal with mediators' status (professional standards, deontology, registration on the role, etc) which remains of the Cantons' competence.

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. This point is not regulated by the GCP (because it is a federal matter). With the FDCP the question would remain unsolved for conventional mediation; on the other hand, for court referred mediation, the question is regulated (by the combination of art. 60, 194, 210) as court referred mediation can be chosen by the parties instead of the obligatory preliminary judiciary conciliation.

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. In such a case, he or she would propose to the parties to go back to mediation process (art. 71J).

This problem is ruled in the FDCP (art. 214), which besides doesn't describe the conditions of ratification.

b) of mediation clauses

There is no legislation relating to the enforceability of mediation clauses, neither in the GCP nor in the FDCP. The draft sent by Gemme-CH last December to the Committee of the Legal Affairs of the Council of States has made proposals both for civil procedure and arbitration. This point is also regulated in the Swiss rule of the SCCI.

4.2. The rules of SCCI

This important and expected document was adopted April 1rst 2007 by the SCCI, having been issued in consultation with some experts of SCCM and Gemme-CH.

It contains suggested mediation clauses for mediation only, for mediation followed by international arbitration and for mediation followed by domestic arbitration, as well as clauses of suggested agreement to mediate when the parties are already involved in a dispute or in a problem (for the same three above mentioned situations).

The rules themselves contain provisions on the scope of application, on the filing of a request, on qualifications and role of the mediator, on code of conduct, on procedure rules, on termination of mediation, on exclusion of liability, on costs. They are available in English French and German[27].

V MEDIATION SCHEMES

The GCP explicitly enables the judge or the parties to refer cases to mediation, at any step of the civil procedure. Previously, judges might also propose it, as it was not forbidden by GCP. But the legitimacy of his or her proposal was often questioned. The same situation prevails in several Cantons.

In the FDCP, this point is governed (art. 210, 211) in a similar manner. Thus, presently, the court referred system seems to have preference. But with the time, and if Swiss conciliators receive good mediation education and apply mediation rules and code of conduct (which forbid him or her to give opinion, advice or proposal) it might be that some of them could behave as mediators (this would constitute a true In-court-mediation system, as it is the case in Canada, Norway, and other European countries). It is a question of time: years for some Cantons, maybe decades for others.

In this context, according to the point of view of Louise OTIS's opinion[28], it is essential for the parties to know in advance and to accept the *rules of the game*: facilitation or evaluation, the first being preferred. These approaches imply different spirits, different behaviours and different methods.

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[27] www.ccig.ch

[28] Louise OTIS, Modes alternatifs de règlement des litiges: la médiation judiciaire. La justice conciliationnelle: l'envers du lent droit, un rapport sur les MARL, Rapport, Strasbourg novembre 2003, Conférence des juges, Conseil de l'Europe, n°6.

Fairness requests from the judges to be clear before initiating the most appropriate process.

VI MEDIATION ORGANISATIONS

6.1. There are several topic mediation organisations in Switzerland:

The SWISS CHAMBER OF COMMERCIAL MEDIATION (SCCM/CSMC/SKWM) comprises four sections: one for Zurich region, one for Central Switzerland, one for French Switzerland and one for Italian Switzerland.

The FEDERATION OF THE SWISS ASSOCIATIONS FOR MEDIATION (FSM/FSM/SDV). It comprises several associations with general or specialized objectives (family disputes).

The SWISS LAWYERS ASSOCIATION (SLA, FSA, SAV). It comprises the main Bar associations of Switzerland. All of them have adopted guidelines and ethical codes of conduct for conventional mediation.

Besides, as seen above, the SCCI will play an important role in the next future of mediation in Switzerland, in promoting it in commercial disputes.

6.2. An organisation plays a specific role:

The SWISS ASSOCIATION OF JUDGES FOR MEDIATION AND CONCILIATION (GEMME-CH). It was founded 8th October, 2004 and was admitted to the European Group 14th December, 2004.

Its main objectives consist in promoting mediation and strengthening judiciary conciliation on the jurisdictional, cantonal and federal levels.

Its 37 members have the practices of judiciary, and/or conciliation and/or mediation. They belong of all regions of the Country and represent all levels of jurisdictions (from first to federal Instances and even one judge of the European Court of Human Rights).

6.3. The following institutions propose an education:

- CEFOC, Centre d’études et de formation continue, Geneva
- Groupement Promediation (GPM), Geneva
- Institut universitaire Karl Bösch, IUKB, Sion
- Mediation commission of the federal bar association (FSA), Bern

- University of Geneva, Law Faculty
- University of St Gall, Law Faculty
- University of Zurich, Law Faculty
- WIPO Arbitration and Mediation Center Geneva.
- and many other private Institutes.

Unfortunately, dispute management is not yet taught compulsorily to future layers and magistrates.

VII. CONCLUSIONS

7.1. Since a decade conventional mediation plays its new complementary role among ADR in Switzerland, in particular alongside a generally efficient judiciary conciliation system.

Alleviating the overcharge of the courts may be the effects of mediation, not its aim. ADR will mean rather **amicable** or **appropriate** than alternative dispute resolution in Switzerland, if amicable resolution has priority[29], litigation being therefore its alternative.

The Geneva legislation and - hopefully - the FDCP will offer new perspectives, the judges acting as promoters of mediation when it appears appropriate for the case and for the litigants, at each step of the procedure.

It should be mentioned that mediation has met insidious but effective reluctance from certain circles, whose main motivation is the fear: fear to change, fear to loose power and fear to loose a rental income situation[30].

7.2. 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, traditional 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).

[29] This opinion was also clearly expressed in France by GARBY Thierry La gestion des conflits, CMAP, economica Paris 2004, p. 50.

[30] It explains the suppression of mediation provisions in the two codes as the censorship of any debate on this item in one of the most famous newspaper of east Switzerland.

7.3. Confidentiality plays an important role both in classical mediation (facilitation) and in classical conciliation (estimation).

In this respect par. 161 of Opinion No 6 (2004) has an essential scope, prescribing explicitly the separation of the person and of the role for the third party, being a judge or not. It provides that judges will perform this task (mediation) in disputes other than those where they are requested to hear and decide[31].

7.4. One important point remained in the shadow in the opinion No 6 (2004) on the ADR: the absolute necessity for the judiciary to receive the appropriate information (as mediation prescriptors) and education (as mediators).

The responsibility for education belongs both to authorities and mediation associations, who have to take initiatives of pilot projects, to make proposal (as draft law) and to offer collaboration in this field on jurisdictional, cantonal and federal level.

Without appropriate education, any law on mediation would remain meaningless. Thus a recommendation of the Committee of Ministers to the Members States in that direction would be welcome.

As wrote Thierry GARBY:

> *"Dispute management is a large progress of civilisation but also a cultural revolution. It exacts from all members of the organisation and from all partners to modify deeply their conduct in case of tension"*[32]

In this respect, the importance of scholar mediation by peers should be emphasized: on one hand, it permit to limit or avoid violence among teenagers and on the other hand it prepares them, as future citizens, to manage their disputes within themselves.

7.6. Amicable resolution or litigation ? Old priority or old approach? Old priority or new approach? New priority or old approach? New priority or new approach?

It is in the spirit of mediation to leave these questions open for your reflexions. Instead we prefer conclude with a quotation of Guy CANNIVET, who is the former first President of Gemme at the time he

[31] The idea of separation of role and person of the third party is already implied in Plato, The Laws, VI, 767, Prescribes that before going to trial people should meet their friends, neighbours or other persons in order to find a solution to their disputes. Quoted by: Guy CANNIVET, *in* Art et Techniques de la Médiation, Litec, Paris, 2004, p. 199 ff.

[32] Cf note 29 p. 164, free translation from French.

was the first President of the French Cassation Court, and now member of the French Constitutional Court:

> *"There is no principle model based on litigation and accessories model turned toward amicable resolution, but a set of techniques which gives to the judge and to the parties a choice of ways to follow for solving their disputes in a most appropriated manner"*[33].

Annex

[33] In Art et technique de la médiation, Litec, Paris, 2004, p. 202 (free translation). See also MIRIMANOFF Jean, VIGNERON-MAGGIO-APRILE Sandra, Pour une libre circulation des différends civils et commerciaux entre les voies judiciaires et extrajudiciaires, ZSR/RDS 126 (2007) I p. 21.

Annex