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Swiss group of Magistrates for Mediation and Conciliation

# FEASIBILITY OF MEDIATION SYSTEMS IN SWITZERLAND

**Does the future belong to court-annexed (justice model),
to court connected (market place model) or to hybrid mediation systems?**

***Reflexions at the light of the New Unified Code of Civil Procedure
and of the Swiss Practice, with some excursions into comparative law****

*Jean A. Mirimanoff*

**UIA WORLD FORUM OF MEDIATION CENTERS**

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Seek ye first peace

Saint Nicolas de Flue

*Letter to the Authorities of Bern*

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# FEASIBILITY OF MEDIATION SYSTEMS IN SWITZERLAND

**Jean A. Mirimanoff**

*Abstract*

***According to the International Law Instruments (CoE Resolutions and Guidelines and EU Directive), to Comparative Law and to the Practice, there is no reason to give a preference between "court - connected mediation" and "court - annexed mediation", both of them being efficient for commercial disputes. The choice depends on other criteria : political, financial or philosophical. However the "out - of - court mediation ", without a "connecting body", seems an uncompleted model, thereby inefficient and illusory. A car without an engine. An empty shell. To transform this rather primitive form into a "court - connected mediation" implies initiatives, efforts and costs from the public and the private sectors. It is not an accident that this conclusion is shared in France and here. ADR Referral Services, on the dutch or american models, and education of the practitioners count as the most important ADR implementation measures. To leave them would jeopardize the future of mediation, not only in commercial disputes. In the same way ADR implementing mesures are the necessary complement of the Swiss Rules on Commercial Mediation of the Chambers of commerce.***

***The difficulties and controversies arising in implementing ADR (and in particular mediation in some european countries as in Switzerland ) reflect, as a symbol, the " chaos " wich leads from an old order (the State Justice of the XIX$^{th}$ century) to a new one (the plural Justice of the XXI$^{st}$ century). This situation recalls,*** *mutatis mutandis*, ***the passage from the unilateral Justice to the democratic Justice described by Eschyle. Like at the time of the poet we can remain confident in contributing to this new change as long as we keep in mind and in practice the values taught to the Athenians by Athena founding her Areopage : democracy, openess and humility. The Human Person is in the heart of mediation, and mediation is in the heart of the Human Person.***

***Implementing mediation is not an easy task : it exacts a fair, efficient and lasting cooperation between and among all interst circles, in order to facilitate the event of more spaces of peace, here and elsewhere on our little planet.***

***Résumé***

***On rencontre deux grandes familles de systèmes pour relier la médiation au judiciaire. L'une consiste à confier la médiation "à l'interne" du Pouvoir judiciaire, c'est à dire à la déléguer à un magistrat spécialement formé à cet effet et qui ne sera pas en charge du cas si la médiation n'aboutit pas. C'est le système qui a été choisi par le législateur de la Slovénie, de la Norvège, du Brunchwig (Allemagne) et du Québec (Canada, en Appel), par exemple. L'autre revient à déléguer - ou proposer - la médiation "à l'externe" auprès d'un tiers qualifié, (quitte à ce que, le cas échéant, les parties demandent au juge de ratifier l'accord issu du processus). C'est le système en vigueur depuis longtemps dans les Etats d'Amérique du Nord, introduit en Grande Bretagne il y a une vingtaine d'année, et aux Pays-Bas plus récemment. Les deux familles sont reconnues sur un pied d'égalité par le droit international en la matière, de nature non contraignant, essentiellement les Recommandations et Lignes directrices du Conseil de l'Europe (de portée générale) et la récente Directive de l'Union européenne (de portée transnationale) et ils fonctionnent avec efficacité.***

***Pourquoi la législation inspirée du système de la délégation "à l'externe" n'a eu qu'un impact insignifiant par rapport au volume du contentieux judiciaire dans des pays comme la France depuis 1995, la Belgique depuis 2005, ou à Genève depuis 2005 ? A la différence des autres pays précités, qui ont tous pris d'efficaces mesures d'accompagnement et de mise en oeuvre, tels des Centres de référence en matière d'ADR en amont et en aval de la saisine du tribunal (ADR Referral Services), rien de tel n'a encore été entrepris dans les trois cas mentionnés, dans lesquels les autorités se sont contentées de penser que la loi suffirait à elle seule pour y développer la médiation. L'écoulement du temps permet de mesurer l'inanité de ce raisonnement, omission fâcheuse que l'on s'apprête à réitérer en Suisse. En effet, tandis que les Autorités Cantonales se soucient de préparer la justice traditionnelle en vue de l'entrée en vigueur du Code de procédure civile le premier janvier 2011, rien à ce jour - à notre connaissance - n'a été envisagé par elles pour traduire dans la réalité judiciaire des Cantons l'injonction des Autorités fédérales : "Le règlement amiable des différends a la priorité". Il en va de même pour mettre en oeuvre le Règlement Suissse pour la Médiation commerciale des Chambres suisses de commerce. Les milieux intéressés, en particulier les organisations faîtières de magistrats, d'avocats, d'arbitres, de médiateurs et les Chambres suisses de commerce n'ont qu'à peine deux ans pour agir. A défaut, en particulier de Centres ADR de référence des conflits (ADR Referral Services) sur le modèle néerlandais ou américain, la médiation selon le CPS resterait une coquille vide, et pas seulement d'ailleurs en matière commerciale.***

***C'est en proposant aux Autorités fédérales mais surtout Cantonales, ensemble et de manière concertée, des mesures concrètes sur la plan législatif, logistique et financier (ce terme qui fait si peur) et en sachant aussi s'engager dans des expériences pilote répondant aux besoins de chaque ville, canton ou région, que les cercles intéressés rendront possible l'essor de la médiation, en particulier de la médiation commerciale dans notre pays. La mise sur pied de Centres ADR de référence sera pour les principales villes de Suisse désireuses de rester des places attrayantes pour le commerce international l'outil - en matière de gestion de conflits - correspondant à cette ambition. Mise en oeuvre qui implique à la fois le secteur privé et le secteur public. Pour ce dernier il y aura un "retour sur investissement" puisque le réglement amiable donnera à la fois satisfaction aux personnes et aux entreprise tout en allégeant - indirectement mais incontestablement - le coût de la Justice traditionnelle pour l'Etat. Un choix "gagnant- gagnant" pour les deux secteurs.***

***Sans jamais oublier, au delà de ces contingences, que la personne humaine est au coeur de la médiation, et la médiation au coeur de la personne humaine.***

***Zusammenfassung***

***Bezüglich der Verbindung der die Mediation mit der Justiz bestehen grundsätzlich zwei Systeme. Im ersten wird die Mediation gerichtsintern von dazu speziell ausgebildete Richtern durchgeführt. Dieses System wurde zum Beispiel in Slovenien, Norwegen und Québec gewählt. Beim zweiten System wird die Mediation gerichtsextern durch qualifizierte Privatpersonen durchgeführt, wobei die Parteien die gertroffene Vereinbarung allenfalls richterlich genehmigen lassen können. Dieses System wird seit langem in Grossbritannien, den nordamerikanischen Staaten und seit kürzerem auch in den Niederlanden angewendet. Beide Systeme funktionieren gut und werden vom massgebenden internationalen Recht als gleichwertig anererkannt. Dieses besteht hauptsächlich in nicht zwingenden allgemeinen Empfehlungen und Leitlinien des Europarats und neulich einer Richtlinie der Europäischen Union (mit transnationaler Bedeutung).***

***Es stellt sich die Frage, weshalb die gerichtsexterne Mediation, obwohl sie in Frankreich seit 1995 und in Belgien (und Genf) seit 2005 in gesetzlich geregelt wird, in im Verhältnis zur streitigen gerichtlichen Streiterledigung nur eine untergeordnete Bedeutung erlangt hat. Dies lässt sich damt erklären, dass in diesen Ländern keine wirksamen ergänzenden Massnahmen, wie z.B. die Einrichtung von Beratungsstellen für die alternative Streitbereinigung (ADR Referral Services), vorgesehen wurden, welche sich in anderen Staaten als wirksam erwiesen haben. Die Erfahrung leht daher, dass neben einer gesetzliche Regelung zusätzliche Massnahmen nötig sind, um die Entwicklung der Mediation wirksam zu fördern. Dennoch wird in der Schweiz die Einführung solcher Massnahmen unterlassen. So haben die Kantone bei der Vorbereitung der für 2011 vorgesehenen Einführung der Schweizerischen Zivilprozessordnung (ZPO) - soweit erkennbar – keine Massnahmen vorgesehen, um die Umsetzung des gesetzgeberischen Grundsatzes des Vorrangs der einvernehmlichen Streitbeilegung zu fördern. Auch die Schweizer Handelskammern haben in ihrer Mediationsrodnung für Wirtschaftkonflikte keine ADR-Beratungsstellen nach niderländischem und amgerikanischem Vorbild vorgesehen. Es ist daher zu berüchten, dass in der Schweiz bis zur Einführung der ZPO keine solchen Stellen eingerichtet werden und die getroffene Mediationsregelung eine leere Hülle bliebt.***

***Um dies zu verhindern wird den Behörden des Bundes und vor allem der Kantone vorgeschlagen, zusammen auf gesetzgeberischer, logistischer und finanzieller Ebene die Einrichtung von ADR-Beratungsstellen, bzw. entsprechende Pilotprojekte zu planen oder zu unterstützen. Bei der Umsetzung sind sowohl der öffentlichen als auch der privaten Sektor gefordert, welche beide daraus Nutzen ziehen, da die Mediation nicht nur die betroffenen Personen und Unternehungen zufriedenstellt, sondern gleichzeitig auch die Kosten der staatlichen Gerichtsbehörden senkt.***

***Die genannten organisatorischen Fragen sollen nicht vergessen lassen, dass der Mensch im Zentrum der Mediation steht und diese eine Herzenssache ist.***

# Feasibility of Mediation Systems in Switzerland

## Does the future belong to court-annexed (justice model), to court connected (market place model) or to hybrid mediation systems?

### Reflexions in the light of the New Unified Code of Civil Procedure and of the Swiss Practice, with some excursions into comparative law

JEAN A. MIRIMANOFF*

## I. Scope, Content, Aim

The question mentioned in the subtitle may raise others, such as : does the concept of *model* imply a choice or - smoother - a preference that should be made between the two systems in the future? And if so, according to which criteria, or in which situations? Instruments of International Law, such as the European Directive (2008/52/EC of May 21st) of the European Union (EU) on certain aspects of mediation in civil and commercial matters limited to cross-border disputes and Recommendation (Rec (2002) 10 of September 18th of the Council of Europe (CoE) on mediation in civil matters, give a clear answer : both systems or models are recognised and are without hierarchy.

They are explicitly mentioned in paragraph 12 of the preamble of the Directive, a paragraph that enlightens the scope and the meaning of art 5 *Recourse to mediation* on one hand, and in ch. III par. 1 of the Recommendation which provides that *" States are free to organise and set up mediation in civil matters in the most appropriate way, either through the public or the private sector "* on the other hand. Concerning the public sector these two instruments prohibit - the Directive expressly in par. 12 and the Recommendation implicitly in ch. IV - that the judge in charge of mediation would be in charge of the case, in order to preserve the liberty of the parties, whose declarations and proposals are sheltered by the principle of confidentiality. Besides court-annexed and court-connected models exist - as taught by comparative law[1] - hybrid systems, which are also admitted by the above mentioned instruments. For instance the French and the Belgian laws authorise (in an apparently out - of - court mediation) the judge to choose the mediator (at the request of the parties in the Belgian law)[2], to intervene on the limits of the mediation process and to fix the mediation costs; such *light* and formal interventions of the judge being expressed and recognised in the abovementioned instruments. This statement means that these systems are fully compatible with mediation principles contained by the UE Directive and the CoE Recommendation.

Thus they welcome the various systems existing in Europe, among which it would not be easy to make a fair evaluative choice. What about the teaching of the practice in this respect? For instance at the Conference on Mediation organised by the Council of Europe and the Ministry of Justice of Lithuania in Vilnius May 24-25th 2007 Mr Tony Allen, mediator, explained the results of the out - of - court system of Great Britain while Hon. Eckart Müller Zitzke, judge and mediator, described those of an in - court system of Braunschweig (North Germany), both having evaluation reports and statistics. The rate of success (above 80 % in the two situations) and appreciation of quality convinced everybody that both systems were the best models to adopt!

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- Ex. Report to UIA WORLD FORUM OF MEDIATION CENTERS, Lausanne, Jan. 31st 2009

1 *Cf.* CoE, Early Settlement of disputes and the role of Judges, Strasbourg, 24-25 th Nov. 2003; SINGER Jayne and McKENNA Cameron, The EU Mediation Atlas : Practice and Regulation, Ed. Karl Mackie, CEDR, 2005; TARRAZON Mercedes and DE BERTI Giovanni, *The view from civil law juridictions, Varied experiences and moving targets, in* The key issues and challenges facing mediators, London, Sept. 24th 2008

2 *Cf.* BOURRY d'ANTIN Martine, PLUYETTE Gérard et BENSIMON Stephen, Art et techniques de la médiation, Litec, Paris, 2004, at p. 187 which quotes the french civil procedure : cf. art 131-1, 131-3, 131-6 and 131-10; *cf.* art.1734 par 2 and art. 1735 par.3 of the Belgian civil procedure

Besides, it should be stressed that these two described situations in Vilnius refer to countries with different law systems (common law and civil law) and where mediation was introduced a long time ago in the first country and a very short time ago in the second.

Another difficulty would make any comparison problematic in Europe : even on the continent where countries are governed by civil law we meet the three above mentioned systems : court - annexed, court - connected and hybrid Mediation Models. Lastly, European countries present also a large scale of developments of mediation : having adopted legislation a long time ago may be (but not necessarily) a sign of success and conversely. Even within the same country the situation may vary in its different regions, jurisdictions and fields. Why family mediation is a success in a little town like Tarascon, in France, and why did social mediation grow more quickly in Grenoble than in other cities?[3] The same statement can be made in Switzerland and in many other European countries, as we are aware through our exchanges in the frame of the European Association of Judges for Mediation (GEMME).

Therefore we can overview without complex but with criticism the situation that prevails in Switzerland, in relation with the two or three above mentioned models.

A brief excursion seems necessary, first in an institution closely related with our object : ADR Referral Services, which we meet in the different models (II) and after in the main characteristics of the future unified law on Swiss Civil Procedure (SCC) (III)[4]; then we will inquire whether court - annexed mediation (IV) and / or court - connected mediation (V) are feasible in our country, before evoking a draft pilot project proposed recently by a contact group of mediation interest circles for the implementation of ADR (VI) and conclusions (VII).

Without pretending to be a scientific analysis, the present report - rather written from a pragmatic approach - aims to stress the imperious necessity for the mediation interest circles ( to which arbitrators belong) to act closely in a fair, efficient and lasting collaboration, which is the only way for implementing ADR and for introducing mediation and mediation spirit in the judiciary culture of our country.

## II. ADR Referral Services : A Vital Necessity

In framing the first and only detailed legislation on civil mediation in Switzerland at the time[5], (the law in force in the Canton of Geneva as of first January 2005 to 31 December 2010[6]), the referral problem was - as any other implementing measure - completely underestimated. Hopefully the Swiss Cantons will avoid the same mistake before January 2011. The law being adopted unanimously and enthusiastically by the Parliament of Geneva after a broad consultation, nobody thought that for a judge "to propose to the parties to amicably settle their dispute through the services of a civil mediator, who is a qualified, independent, neutral

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3 In these two cases it can easily be explained by the commitment of two Judges, Marc Juston and Béatrice Blohorn - Brenneur , rewarded respectively by the "crystal balance" award of the Council of Europe for the first and by the "légion d'honneur" for the second, Hon. Béatrice Blohorn-Brenneur being cofoundator and Vice president of Gemme, of which Hon. Marc Juston is a member

4 *Cf.* Message of the Federal Council related to the Swiss Code of Civil Procedure of June 28th 2006 ( FF 2006 6841 ); LUKIC Suzana, Le Projet de Code de procédure civile fédérale, CEDIDAC, No 74, Lausanne, 2008, in particular TAPPY Denis, *Le déroulement de la procédure*, p. 189-193 and his bibliography p. 231; MIRIMANOFF Jean A. and VIGERON-MAGGIO-APRILE Sandra, La gestion des conflits : manuel pour les praticiens, CEDIDAC, No 78, Lausanne, 2008, in particular SAMBETH GLASNER Birgit and SALBERG Anne Catherine, *La médiation*, p. 57 - 74; PFISTERER Thomas, *Unterwegs zur Einigung mit Mediation in der schweizerischen ZPO? in* SJZ, Nov. 2007; MEIER Isaak and MUERNER Diana, *Mediation und Möglichkeiten ihrer Förderung durch den Gesetzgeber - unter der besonderen Berücksichtigung der neuen eidgenossischen ZPO*, ZJAP No 1.2004, p.1-9; SAMBETH GLASNER Birgit, *Commercial Mediation in Switzerland*, presentation at GEMME CONGRESS on " Mediation in Service of Peace ", Nov. 6-7 2008, on http://www.gemme-conference.org/index.php?option=com content&task=view&id=47&Itemid=49

5 In comparision with Glaris and Zurich legislation, where short reference to mediation is made

6 Law of civil procedure dated April 10 1987 amended October 28 2004, Art. 71 A to 71 J (E 3 05) and Law on the organisation of the judiciary dated Nov. 22nd 1941 amended October 28 2004, Art 161 A to 161 K (E 2 05), translated in english by LACK Jeremy, Lawyer and Mediator, Geneva, texts available on www.gemme.ch. *Cf.* MIRIMANOFF Jean A., *Principal Characteristics of Geneva's Legislation, in* Gemme-Switzerland, Civil Mediation in Switzerland, Geneva, January 2005, www.gemme.ch ; *L'eurocompatibilité de la loi sur la médiation civile du 28.10.2004, in* SJ, No 5, Vol. II, April 2005, p.125-129, www.gemme.ch; CHENOU Martine et MIRIMANOFF Jean A.*:, La médiation civile ou métajudiciaire : pour une nouvelle synergie et contre la confusion des genres, in* SJ, No 10, Vol.II, 2003, p.271-316, www.gemme.ch

and impartial person"[7] would present a major difficulty. In examining the comparative law, the French civil procedure and the Belgian draft law attracted the favour as models for many reasons : they were available in French and emanating from countries having the same civil law system. Moreover, for historical reasons[8] the code of civil procedure of Geneva has been almost transferred from the French civil procedure in the beginning of the XIX$^{th}$ century. Now neither French civil procedure nor Belgian draft contained provision on ADR Referral Services.

Problems came from the lawyers, from the parties, and surprisingly from the judges themselves. Nobody realised that this issue, mediation proposal, represents (as a symbol) a key issue for implementing mediation : not only as a passage for a case from civil proceedings to mediation process, but overall as a passage for all the actors from the old judiciary culture to the new one. Besides facilitating this passage needs specific skills from the part of the judge. Confronted with the fear of facing novelty, and to fear to loose power or income discouraged the efforts made by some judges to let the law be applied! Now it is clear that ADR education, ignored by the majority of our Swiss universities till now, will constitute the right remedy in the long term. But what about in the near future? In the present circumstances the goodwill of some judges, neither here nor in other countries knowing a similar situation, might overcome these obstacles. Furthermore the often overburdened civil judges will hesitate to devote their time to convince lawyers or parties whose vast majority remains reluctant or - in the better case - sceptical towards mediation. Sensibilisation of the magistrates and lawyers, encouraged by the Judiciary, will change the situation in the middle term. As long as the judges are neither motivated nor having the skills to promote mediation in the exercise of their function, the only way to implement mediation in the short term would be to create ADR Referral Services (*cf. infra* ch. VI).

Hon. Machteld Pel explains in her book "Referral to Mediation, a practical guide for an effective mediation proposal"[9] what is the job accomplished by these Services, in such a detailed, precise and concrete way and with such convincing arguments, that every European magistrate should posses it as his or her Bible to help promote mediation. It is also a source of inspiration for mediation interest circles.

ADR Referral Services may either be private or public institutions. Even in a court-connected mediation such services may be accomplished by court clerks or magistrates :

"Many courts offer an orientation session, often mandatory, in which parties to a case and/or their attorneys receive information about dispute resolution services. The case is reviewed to determine whether referral to a dispute resolution service is appropriate and, if so, to which one. At screening session, a list of court's dispute resolution services providers is available"[10].

Of course in the court - annexed mediation these review and screening are probably always made by court services[11].

For a country it may be useful to have private and public ADR Referral Services, as indicated in Hon. Machtel Pel's book[12]. Now there are no generally recognised ADR Referral Services in Switzerland. Thus for a country like Switzerland it is vital to establish such Services in the main cities : Geneva, Lausanne, Neuchâtel and Fribourg, the French speaking part, Basel, Bern, Lucerne, St Gall and Zurich the German speaking part, and Lugano the Italian speaking part. Only two years are at the disposal of the mediation interest circles to achieve such an uneasy job. Will they overcome the challenge?

In addition to Dutch and American experiences, they could for instance take into account the "Projecto conciliamo" of the Court of Milan (Italy), the pilot experience of Barcelona (Spain), or the French initiative presented by the Paris Court of Appeal to the Ministry of Justice, called "*Célérité et qualité de la Justice, la Médiation, une autre voie*" (Celerity and Quality of Justice, Mediation : another way), last October 2008,

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7 Art 71 A, transl. by Jeremy LACK, barrister at law and mediator, Geneva

8 Geneva was occupied then annexed by France 15 th April 1798 and liberated 31 st Dec. 1813

9 Sdu Uitgevers, The Hague, 2008

10 Massachussetts Supreme Judicial Court / Trial Court Standing Committee on Dispute Resolution, A Guide to Court- Connected Alternative Dispute Resolution Services, p. 13

11 *Cf.* BETETTO Nina, *The Court-annexed Mediation in the Light of Access of Justice*, Arché, Türkiye'nin ilk Mediasyon Dergisi, 01-02; ZALAR Ales, Report on Mediation in Slovenia, in CEPEJ, Mediation, Strasbourg, October 2003

12 *Cf.* note 9, p.21 - 25

written by Hon. Jean-Claude MAGENDIE, First President of the Paris Court of Appeal.; he proposes to designate for each of the 33 Courts of Appeal a complex composed of four interactive bodies : a Mediation Committee (i.a. for establishing a list of mediators), a Referral Magistrate or a mediation Unity (i.a. for informing the parties on mediation) and Pilot Chambers (i.a. for helping the parties to choose their mediator and to ratify their mediation settlement). For a country like Switzerland[13], Referral Services are needed in or near every civil and commercial Tribunal of the ten above- mentioned cities.

The ***Swiss Rules of Commercial Mediation*** (*cf. infra* ch.5.4.1.) present the same implementation problematic.

# III. Main Characteristics of the New Legislation (SCP)

As of the first of January 2011 the Unified Swiss Law on Civil Procedure (SCP), adopted by the Federal Chambers 19 December 2008, will abrogate and replace the 26 cantonal laws. Before checking which kind of model(s) is feasible in practice, it is necessary to draw on SCP main characteristics.

## 3.1. A system of double competences

Whereas the competence to legislate on civil procedure was delegated to the Confederation by the reform of the justice of 8th October 1999, the organisation of the Judiciary still belongs to the Cantons. They are free to maintain or modify their tribunals, and are not compelled to create new institutions[14].

## 3.2. Plurality of the new civil justice

The new legislation comprises the two main ways of dispute resolution : amicable[15] dispute resolution with the conciliation and mediation on one hand, and litigation with civil procedure and arbitration on the other hand. The hybrid forms of conciliation will constitute a curiosity in comparative law (*cf. infra* ch.3.5). Mediation and arbitration remain in the private sector whereas conciliation and civil procedure in the public sector.

The new law does not confine ADR to mediation and conciliation; there is no *numerus clausus* in this ADR system : the other non mentioned ADR such as the ombudsmen offices will still work, mainly in the field of bank, insurance and travel disputes, generally before the case is submitted to an arbitral or state tribunal; they are just not regulated by the law.

## 3.3. ADR has priority

Plato, around two thousands and five hundred years ago, already recommended to his fellow - citizen to recourse to a third person before submitting their case to a tribunal[16]. In his message on SCP the Federal Council wrote that "amicable resolution has priority"[17], whereas the French Ministry of Justice declared one year after that ADR should be privileged whenever it is possible[18], both confirming the opinion of the great philosopher. Will they be heard? As far the Swiss Cantonal Authorities are concerned, probably not immediately (*cf. infra* ch. 6), but they will be reminded by the mediation interest circles. These could also rely on the Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters (CEPEJ (2007) 14) adopted by the Council of Europe December 7th 2007. As Instrument of International Law, even if not mandatory, their concern is addressed to the different

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13 *Cf.* MEYER Valerie, Court-Connected Alternative Dispute Resolution - Amercian Experiences and Swiss Perspectives, Luzerner Beiträge zur Rechtwissenschaft, Band 10, Schulthess 2005

14 *Cf.* RS 101. Nevertheless the Cantons were compelled as of the First July 1990 to settle Conciliation Authorities in rent and lease matters ( art. 274 a Swiss Code of Obligations )

15 Since ADR has priority, litigation is the " alternative", as notes GARBY Thierry, La gestion des conflits, CMAP-Economica, Paris, 2004

16 The Laws, VI, 767, quoted by CANIVET Guy, *in* Art et techniques de la médiation, Litec, Paris, 2004

17 *Cf.* message ( FF 2006 6841 ), p. 6860 in french

18 Quoted by MAGENDIE Jean-Claude, First President of the Court of Appeal, Paris, 2008

State bodies, such as the Cantonal Authorities, who can not ignore them since Switzerland is member of the Council of Europe.

### 3.4. Main Mediation Characteristics

The SCP provides a very flexible and liberal system which permits the parties to a conflict to have recourse - theoretically - to mediation very easily.

Contrary to some other legislations, which exclude some specific fields (as Switzerland does in arbitration matters)[19], any case can be the subject of a mediation process, subject to the ratification of the settlement by the tribunal whenever the law prescribes it[20]. It does not mean of course that the legislator will recommend to submit any case to mediation. In this respect the Recommendation Committee on civil and penal mediation, established by the Geneva law, wrote a Practical Guide to Civil Mediation. This is available in every Chamber of the first instance Tribunal and to the parties or their lawyers, even during a hearing[21].

According to SCP (Art. 213 al.1 and 214 al.1 and 2), the judge may propose at any time to the parties to have recourse to mediation (as in conciliation as in any level of proceedings[22]), and the parties may request it by themselves.

The mediation process enjoys a full autonomy and independence. According to the SCP system the mediation process and the tribunal proceedings do not operate in the same framework and do not share the same methods or objectives, so that any intervention by one in the other, or confusion between people involved in their respective roles are excluded. In other words, civil mediation is always consensual, even when a judge proposes it to the parties : its nature remains intact and its autonomy preserved, without exceptions such as formal questions related to the choice of the mediator, the costs, the time devoted to the process, *etc*. Mediation is essentially "*metajudiciary*" as we wrote at the time[23], that is out -of court, because the third person, the mediator, facilitates the mediation process, whilst the law essentially regulates how the mediation process and civil proceedings interlink with one - another. It is therefore obvious (however escaping to some other legislators[24]) that mediation does not have as its primary objective to "resolve the ***lawsuit,***"[25] which is the duty of the tribunal (and of the traditional conciliation) but - more widely - to appease or to solve the ***conflict*** by re-establishing communication and, if possible, relations between the parties. The SCP provides that "the parties undertake the organisation and course of the mediation" (art. 215).

SCP grants confidentiality to the mediation, stressing that the declarations of the parties should not be taken into account in case of civil procedure, but remains silent on the question of the confidentiality of mediation documents[26], a question regulated by art. 1728 par.1 of the Belgian civil procedure, for instance.

To give mediation settlements the same effect as judgments, parties can request their ratification by the tribunal (art 217 SCP). In matter of divorce or other similar family cases, ratification is a condition of their validity. In this matter and in the fields where the law grants a special protection to the weak party, like in labour law, rent and lease and consummation disputes, the judge shall refuse to ratify settlements contrary to public policy or to mandatory protective rules[27].

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19 *Cf.* art 274 c of the Swiss Code of Obligations, which excludes arbitration for disputes related to rent and lease of habitations and *a contrario* authorises it in case of commercial premises

20 In case of divorce and similar family cases (*cf.* art. 140 of the Swiss civil code, replaced by art. 279 SCP)

21 Available in nine languages on the site www.gemme.ch ; inspired by CEDER, Court referred ADR, 2003. Unfortunately it is seldom used in the practice of the Geneva Court : *cf. supra* ch.2

22 The federal issue is regulated by the federal law on the Federal Supreme Court of 17th June 2005, which does not mention the mediation, but does not prohibit a suspension at the request of the parties

23 Commenting the Geneva law, already drawn in the same spirit. *Cf.* CHENOU Martine *et al*., *cf.* note 6

24 *Cf.* GORCHS Béatrice*, Mediation in Civil Proceedings : sense and Countersense*, RTD civ. 2003, p. 420 (in french)

25 The judgment is based on the conclusions of the parties, thus the Court may not settle outside (*ultra petita)*

26 WIPO Rules regulates accurately the matter *in* art 14 and 17; the documents sheltered are only those concerning transactional proposals, because mediation can not be misused in order to eliminate future means of evidence

27 *Cf.* Gemme-Switzerland*, Ratification of Negociation or Mediation Settlements by the civil Judge, in France, Belgium and Switzerland, in* the Acts of the Conference of Neuchatel, 6 June 2008, available in french or german on www.gemme.ch

Is there a legal mediation definition? Neither the Geneva law nor the SCP give definitions on mediation or on conciliation. Nevertheless the Swiss section of Gemme found it appropriate to add it in its Statutes[28], as an attempt to better distinguish between these methods :

*"1. By mediation it is understood in the present statutes :*

*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 during the course of which the parties seek their own solution".*

In drafting the text on conciliation, we had in mind the two main approaches of conciliation tackled by European judges: the traditional estimation (based on pertinent facts and legal analysis) and the *New Judiciary Conciliation*[29], which can also use some tools of mediation (like encouraging the parties to discover their interests through *maieutical* questioning)[30], however with the faculty to give to the parties opinion, advice and / or proposal of solution(s), ways generally prohibited by the mediation ethical rules in Europe :

*"2. By conciliation it is understood in the present statutes :*

*An informal method for resolving lawsuits, which may be obligatory or voluntary, conducted by a designated conciliator - a magistrate - who is independent, neutral and impartial; a method during which the conciliator may suggest or propose a solution to the parties if they have not reached an agreement on their own".*

Confidentiality seems so obvious, as key and condition of the success of both methods, that - unwisely - it was not mentioned in the two texts.

### 3.5. Plurality of conciliation proceedings

As a synthesis of the various legislations and practices of the Cantons, it is not surprising that SCP took their different concepts of conciliation. Today, conciliation is sometimes obligatory in the Cantons, with exceptions or dispenses, sometimes obligatory at the early stage of the proceedings - the preliminary attempt of conciliation[31] - and facultative later, sometimes facultative, sometimes conducted by a judge not in charge of the case (often at the preliminary attempt), and sometimes by the judge in charge of the case. This last situation is generally prohibited in Europe[32].

The preliminary attempt of conciliation is in principle compulsory (art 197 SCP), and conducted by a "Conciliation Authority"[33], whose organisation is left to the Cantons, but with a *"paritaire"* composition in some matters (art. 200)[34]. The exceptions and dispenses laid down in articles 198 and 199 SCP are however

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28 Art. 4, par 1 and 2, Statutes dated 8.10.2004, which is also the date of its foundation

29 *Cf.* GORCHS Béatrice, *Médiation et conciliation dans les différents sytémes judiciaires européens, Discours de synthèse général*, Actes du Colloque de Grenoble du 2.6.2006, Petites affiches No 145 du 9.10.2005*; La conciliation comme enjeu dans la transformation du système judiciaire,* Revue Droit et Société, No 62, 2006, p.223-256*;cf. Cf.www.gemme.ch ADR selected bibliography,* art of Hon. BIERI Isabelle and BLOHORN-BRENNEUR Béatrice

30 *Cf.* HEIERLI Andreas, Mediation und Gerichtbarkeit, Nachdiplomstudium Mediation an der Fachhochschule Aargau, ergänzt Juni 2003*;cf.* FIUTAK Thomas, le médiateur dans l'arène, réflexions sur l'art de la médiation, trajets/érès, Paris, 2009, p. 154

31 System inherited from the french Constitution of 1790: *cf.* MIRIMANOFF Jean A and VIGNERON Sandra*, La Nouvelle Conciliation judiciaire, in* Gemme, La gestion des conflits, CEDIDAC, No 78, Lausanne, 2008, p.75-96; Stiftung für die Weiterbildung scheizerischer Richterrinen und Richter, Vergleichverhandlungen, Gerzensee, Nov. 2008 and Febr. 2009

32 *Cf. i.a*. Consultative Council of European Judges (CCJE) : Opinion No 6 (2004) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Counncil of Europe on fair trial within a reasonable time and judge's role in trials taking into account alternative means of dispute settlement, par. 161, last sentence. Respecting this injunction is obviously not the priority of some Swiss judges boasting to solve between 40 and 80 % of their cases by such way, a situation maybe less liked by the lawyers, and even less by the parties who dare not, in most cases, refuse this solution being afraid to offend their judge. In our opinion it should be necessary to inquire, through an official but anonymous survey, in the lawyers associations and among the public, whether this method is compatible with a fair justice. With this confusion of role, the confidentiality is completely eliminated. As every practician knows, confidentiality is the key which allows the parties to express themselves freely. It is not the case whenever the judge in charge of the case proposes a transactional solution, even if he or she makes it in a smooth manner. Moreover this approach ignores totally the methods recommended by the New judiciary conciliation, privileging solutions for the future and based on the parties' interests, thus aiming at restoring their links whenever possible. What is the ethic or legal value of consent given under these circumstances? In drafting the bill on this point the Federal Office of Justice was fully aware of the problematic and the existence of Opinion No 6, but the ancient and deep tradition of this practice in some influent Cantons prevailed.

33 In itself the expression represents an antinomy, but was kept for political reasons.

34 In rent and lease disputes, with assessors proposed by the associations of tenants and landlords and a magistrate (not always a professional judge), and in "equality" dispute, with representatives of employees and employers unions with an even number of women and

important[35]. In Geneva for instance around two third of the files will escape the preliminary conciliation. The confusion of roles results from the faculty - in limited cases - given to the conciliator (who may decline the request of the party to do so) to propose to the parties a draft judgment or to take a decision (art. 210 - 212).

Another confusion of role authorizes the judge in charge of the case to mutate into a conciliator, remaining in charge of the case if the conciliation ends up, this in almost all civil and family matters (art. 124 al. 3, 273 al 3 and 291 al. 2). It should be recognised that in family cases the possibility for a judge to amicably settle ( a tradition existing already in the XVIII$^{th}$ century[36]) is better than nothing, but the unification of civil procedure would have been the right opportunity to take into account what was done beyond the Alps and the Jura : the results of successful pilot experiences in several European countries and in Quebec[37].

### 3.6. An inventive legal option : voluntary mediation instead of mandatory preliminary conciliation

To our knowledge we don't meet this option in comparative law. It presents the main advantage to evoke mediation when the dispute is not too sharp.

As often in ADR matters, SCP contains a good idea but does not express it in the same way.

According to the legal text, mediation will replace conciliation "if all the parties request it" (art. 213 al. 1), an event which will rather rarely occur spontaneously nowadays in our Cantons. Though not expressed, mediation may also be proposed at this stage at the initiative of the conciliator, this eventuality being explicitly recommended by the present Geneva legislation[38].

The Federal Council proclaims that ADR has priority, but his hand betrays his voice particularly with this provision, which risk to remain a mediation "larks mirror", an illusion, for other reasons too. As already seen, only about a third of the files will be submitted to mandatory preliminary conciliation. Moreover, many eliminated matters, such as divorce and other similar family cases, industrial property, some litigation above 100.000.- SF belonging to the list of exceptions and dispenses provided by the SCP, are particularly apt to be mediated[39]. Thus they will escape from an early mediation, except if spontaneously proposed by the parties themselves! And, as already stressed in ch. II, an ADR Referral Service plays a vital role before the beginning the proceedings, and not after ! This situation gives a supplementary reason for the mediation interest circles to commit themselves actively in a fair, efficient and lasting cooperation, to establish such ADR Services in the Swiss main cities.

### 3.7. A free circulation of disputes

The flexibility of the system, its autonomy based on the liberty and the responsibility of the parties[40] make it easy for them to change between dispute resolution, as between ADR and litigation, as inside them, to a certain extent[41]. It does not dispense the screening of an ADR Referral Service, but it may help the parties, who made their dispute resolution choice, alone or too quickly, to correct their initial mistake without too much difficulties.

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men, with a magistrate.

35 *Cf.* MIRIMANOFF Jean A, Impact de la conciliation et de la médiation selon le CPC sur l'organisation et la pratique judiciaires à Genève, report to the Geneva Authorities, Dec. 2008, available in french in www.gemme.ch

36 *Cf.* ROTH Barbara*, Messieurs de la justice et leurs greffes, in* Mémoire de la société d'Histoire et d'Archéologie, Toroz, Genève, Tome 54, p.54

37 Available through CoE several bodies : *cf.* OTIS Louise, *La justice conciliationnelle : l'envers du lent droit*, report No 6, European Conference of Judges "Early settlement of Disputes and the role of Judges", Strasbourg, Nov. 24 - 25 2003

38 Art. 71 A of the Geneva law on civil procedure

39 According to the criteria of the above - mentioned CEDER Guide, and its "child " the Geneva Practical Guide on civil mediation

40 *Cf. supra* ch 3.4

41 *Cf.* MIRIMANOFF Jean A. and VIGNERON-MAGGIO-APRILE Sandra*, Pour une libre circulation des différends civils et commerciaux (Réflexions sur les nouveaux réseaux de la justice plurielle : la cas suisse dans le contexte européen)*, RDS, avril 2007, p. 21 ff.

### 3.8. Is the SCP Mediation Euro compatible?

It would be interesting for such a question to be submitted to an independent and competent body of the Council of Europe, such as the CEPEJ Mediation working group[42].

a) At this stage we can just enumerate in a non exhaustive way the important missing issues : the consequences of a "mediation exception" raised *in limine litis*[43], the same question in arbitral proceedings, the regulation of the technical links between mediation and arbitral proceedings, the procedural effect of mediation clauses (Gemme having made concrete proposals on this points[44]), confidentiality of mediation documents, some aspects of the statute of limitations, and the penal consequences of infringement of confidentiality on the federal level.

b) Other points, such as quality standards of the mediators[45], ethical rules, scale of fee, *etc.* were deliberately left to the mediation interest circles, these questions being hopefully at a stage of unification efforts among them.

## IV. Is Court - Annexed Mediation Feasible?

### 4.1. Theoretical approach

Obviously the main ADR SCP Characteristics demonstrate by themselves that the Swiss Parliament has already "cooked its goose" : the system adopted last December belongs to the out - of - court mediation model. But does it result from a conscious and well-informed choice between the two models we are supposed to discuss now? Certainly not. The choice was made sooner, by the Federal Office of Justice (FOJ). In his message introducing the SCP bill, the Federal Council did not even mention the existence of the court - annexed mediation model, writing peremptorily that "*Mediation is an out-of-court process*"[46]. Thus there were no study on the respective merits of the two models, and even no debate at all on the concept of mediation, but only a strong emotional exchange on the necessity to legislate on mediation or not, in the frame of the SCP.

Nevertheless the option made by the FOJ was judicious and far - seeing, because the other option - implying a broader commitment of the State - would not have had any political chance to become adopted by the Federal Chambers. Mediation had already lost two battles and won one[47] before the Swiss Parliament. The first defeat was when the new divorce legislation[48] was discussed : the mediation proposal made by the Federal Council was rejected. The other was at the time, in spring 2007, when the Swiss law of penal procedure was discussed : the mediation proposal made by the Federal Council was again rejected[49], because "penal mediation would be too expensive". Civil mediation just escaped a third defeat in June 2007 when the Federal Chamber of States voted (by 16 voices against 16 with the preponderating voice of the President) in favour of the proposal

42 It was certainly not the main priority of the Federal Office of Justice who, one must recognise, was submitted to intensive pressure to omit mediation in the bill, as it was the case with the first experts' draft where mediation was purposely banished "because it was not necessary to legiferate on this matter ". We have tried the exercise within the Geneva law *in* "*L'eurocompatibilité de la loi sur la médiation civile du 28.10.2004"*, SJ, No 5, Vol.II, avril 2005, p.125 - 139, available in french on www.gemme.ch

43 *Cf.* MONBARON Samuel, *La sanction de l'inexécution des clauses de médiation et de conciliation en Suisse et en France*, RSPC, 2008, p. 425-436; and JAROSSON Charles, *La sanction du non respect d'une clause instituant un préliminaire obligatoire de conciliation ou de médiation*, Note in Cass.Civ. " nd, 6.7. 2000, Cass.Civ.Ist, 23.1 and 6.3.2001, in Revue arbitrale, 2001, p. 749 ff.…

44 *Cf.* Gemme - Switzerland, *Amendments proposals to the draft SCP,* Fribourg, Oct. 2006, on www.gemme.ch

45 Above the importance of international standards *cf.* VANENKOVA Irena, *IMI Objectives and Mediators International standards*, presentation at the GEMME CONGRESS " The Mediation in Service of Peace ", Nov. 6-7 th 2008, on http://www.gemme-conference.org/index.phb?option=com content&task=view&id=47&Itemid=49

46 FF 2006, p.6943, ch.5.14, par 1

47 Art 33 b introduced the mediation in the federal law of administrative procedure 17th June 2005 (RO 2006 2197); *cf.* PFISTERER Thomas, *Grundzuege von Einigung und Mediation in Art. 33 b VwVG in* Isabelle Haener *et al*., Das erstinstanzliche Veranwaltungsverfahren, ZH, 2008

48 The new legislation on divorce entered in force as of First January 2000, and despite the omission on family mediation, some judges proposed to parents to have recourse to it, this task being more difficult without any legal support : the parents were the true loosers of this kind of " war of religion "around mediation

49 Nevertheless it is admitted that Cantons, such as Geneva, having adopted penal mediation are allowed to keep it, and the others authorised implicitly to establish it; besides penal mediation was introduced in the Swiss penal law on under aged offenders

of the Federal Council such it was included in the SCP bill. For the opponents it would has been "useless to legislate in this matter", according to an opinion broadly shared among lawyers and the previous Experts Committee[50], other motivations being hidden behind this position[51].

If, theoretically, the doors of court - annexed - mediation are not closed, as Cantons are encouraged to undertake pilot experiences which could include this subject (submitted to the preliminary authorisation of the Federal Council) (Art. 401 SCP), presently this eventuality seems far away and highly improbable.

### 4.2. Practical approach

Besides legal, political and financial obstacles, it should be mentioned that among the most concerned circles - the Judiciary - the idea of court - annexed- mediation was not retained. Even in the *Swiss Group of Magistrates for Conciliation and Mediation*, nobody thought it possible or desirable, to compared it to our colleagues of the Belgian section who were unwillingly restricted to mediate. The task of implementing mediation on the jurisdictional, cantonal and federal levels, the task of convincing the Faculties of Law to give an appropriate, mandatory and permanent ADR education to law students and to young barristers, and the task of encouraging Authorities to undertake pilot experiences, do not leave them sufficient time to mediate[52]. Another more self direct task consists in introducing or improving the use of "the tools of mediation" in the new judiciary conciliation[53].

## V. Is Court - Connected Mediation Feasible?

### 5.1. General remarks

According to the popular adage people have the government they deserve. What about Justice? Of course the lack of a true debate in the Swiss Parliament on ADR, on their relations with traditional Justice and Arbitration, on their place and utility in a post - modern society is very frustrating for a democratic, sociological, legal and ethical point of view. However it seems a bit utopian and immodest to express an opinion on already settled questions.

Another preoccupation is the question of the feasibility of the system, which could not be eluded in the practice, even if not touched or imagined at an earlier stage. What would be the use of an empty shell? Before raising some questions related to the implementation of the retained model, it seems fair too, with respect to the expectations of the present debate, to examine some interesting objections developed against the so called court - connected mediation, or out - of - court mediation, or *metajudiciary mediation* systems. We refer in particular to some of the fears expressed by Hon. Nina BETETTO, Judge at the Supreme Court of the Republic of Slovenia, because we have felt them formerly, and till now some remain present; we therefore understand them very well[54].

### 5.2. Objections and some counter objections

a) A Court - annexed mediation model would be more suitable for countries having no ADR tradition. As far our country is concerned, Switzerland was, some twenty years ago, an ADR underdeveloped country, and today is becoming an ADR developed country[55]. According to some information, the Swiss Judiciary can in

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50 The First Draft prepared by an Experts Groups did not contain provisions on mediation, despite the fact that three Cantons (Geneva, Glaris and Zurich) had legal provision on civil mediation

51 Mainly traditional fears to loose power or income and fear to face a new challenge

52 At her or his private capacity, may a judge mediate in Switzerland? The Cantons give, as often, various answers : some prohibit it, like AG, some permit it expressively, like TI and NE, some implicitely, like GE and ZH

53 *Cf.* HEIERLI Andreas, Mediation und Gerichtbarkeit, Nachdiplomstudium Mediation an der Fachhochschule Aargau, ergänzt Juni 2003

54 *Cf. supra*, note 11

55 *Cf.* Gemme-Suisse, Médiation civile en Suisse : pratiques cantonales, Fribourg, octobre 2006, www.gemme.ch

this field learn from the Slovenian practice[56]. Meanwhile, a lot of events can quickly occur as it was the case in our country where family mediation was introduced first, then neighbouring mediation and penal mediation, followed soon by commercial mediation, thus becoming more and more important. Therefore, it is not a decisive argument.

b) It belongs to Court public function to help people to resolve disputes by providing access to whatever process is appropriate to a case. By the example given by Massachusetts[57] we learn that the "screening of a case" can be undertaken appropriately by a Court even in an out - of - court model, bearing also in mind the above - mentioned French initiative, also in an out - of - court system country[58].

c) "The Courts provide a protection to litigants. Their purpose is to ensure that both the stronger and the weaker parties in a case have equal access to information and equal power to negotiate a resolution."[59] On one hand even with an out - of - court mediation system, the weaker party, such as the tenant, the employee or the consumer, is protected by the tribunal through the Mediation Settlement Ratification, as provided in the Swiss law.[60] If the parties avoid the ratification, having settled an agreement contrary to public policy or imperative law, this agreement is void and without any legal effect. On the other hand we must admit that the "primitive" out - of - court mediation system, without an ADR Referral Service, doesn't give the parties the information neither on their specially protected rights nor on the best resolution dispute for the case (recalling that mandatory provisions obliges in some fields the parties to submit the case to specialised courts, as in rent and lease or labour disputes, where this exercise is done). But with a "connexion" , as in the Massachusetts Court - connected mediation system[61], these disadvantages are eliminated. It means that only the "true" court - connected mediation provides the parties with the same guaranties as the court - annexed mediation, that means concretely for Switzerland that without a "connecting body", such as ADR Referral services, the parties are submitted to some of the risks mentioned by our Slovenian colleague.

d) "Confining mediation and other ADR methods to the private sector would result in creation of a private justice system, whose effect would undermine courts peace-keeping and law- making functions fare more drastically than court - based ADR possibly could" [62]. We can state that since Antiquity, even under the Roman Empire where the law and legal institutions were very well developed, Mediation and Arbitration have always existed besides State Institutions[63]. More recently the development of Arbitration, which existed also in countries with other economical and political institutions, has not deprived State Justice of its role, function and work. **Moreover it is not the duty of mediation to act in a "law- making function**", since the mediation process is " a formal process for managing communication … during the course of which the parties seek their own solution"[64] Therefore mediation does not have as duty to resolve the lawsuit (on the basis of the "legal conclusions of the parties" : *l'objet du litige*), confusion made often by many legislations in Europe. At least the Swiss judge may and should exercise her or his peace-keeping role by being authorised to conciliate at any step of the proceedings.[65] The repartition of the different justice activities between public and private sectors belongs to the policy of each State, and is therefore a political issue. As far as Switzerland is concerned, the Federal Council has clearly declared that " ADR has priority", and that " the Court is not a commercial corporation worried about marketing and turn - over. It is an Authority, **whose task is to solve disputes that the parties can not, alone or with a third person, solve by themselves**:" This concept places

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56 CEPEJ, Mediation, Report prepared at the request of Switzerland, Strabourg, 3.10.2003, elaborated *i.a*. by three Slovenian Experts, Ms VINDELAV V.; Mr ZALAR A. and Ms GENN H.

57 *Cf. supra note 10, and quotation ch.II*

58 *Cf.* MAGENDIE Jean-Claude, *op. cit. in* ch*. II*

59 *Cf.* BETTETO Nina, *op.cit.,* ch.4.1.

60 Art 71 I of the Geneva CP provides :

"The Judge ratifies the parties' settlement agreement if they request it. Subject to public policy or imperative law, he cannot modify the contents of the settlement agreement submitted."

Art. 217 SCP does not give these conditions, which are mentioned however in its commentary (FF 2006 6945, ad art. 214)

61 *Cf. supra*, ch.II

62 *Cf.* BETTETO Nina, note 58.

63 *Cf.* DUSS-Von WERDT, Homo Mediator, Gechichte und Menschenbild der Mediation, Klett-Cotta, Stuttgart, March 2005

64 *Cf. supra*, ch.3.4.6

65 *Cf. supra*, ch. 3.5

State Justice - in commercial disputes - as an "alternative" to amicable dispute resolution[66]. Two important factors playing their role in any dispute resolution inspire this concept : the liberty and the responsibility of the parties toward their conflict[67].

### 5.3. SCP Mediation : an empty shell?

We have discovered along these lines that it is as important to know the difference between "court - annexed mediation" and "court - connected mediation, and to distinguish between "in - court mediation" and "out -of - court mediation", these concepts being similar but not identical. Choosing between the first alternative answers political expectations, whilst it does not seem the case if we compare "out - of - court mediation" with "court - connected mediation", the last being the fulfilment of the first. As long as we have no ADR Referral Services in Switzerland, would it make the future SCP Mediation an "empty shell"?

According to experiences made in Geneva in the last four years, in France since thirteen years, in Belgium since four years, with typical "out -of- court mediation" systems, only a very low rate of civil files are submitted by the judges of these countries to mediation in commercial matters[68]. But at the same time, whenever mediation is chosen, the rate of success is over 60 %. This means that it is both appropriate and necessary to constitute "connecting bodies", such ADR Referral Services, to make the system more efficient and more popular. That is one of the essential implementing measures of mediation, but of course not the only one.

There is no future for SCP mediation in Switzerland without political, logistical and financial support from the Authorities. The choice made in favour of an out - of - court mediation would jeopardize ADR and mediation itself, if the Authorities would disengage totally of their fate. One can not at the same time pretend that "*ADR has priority*" and abandon the consent system at its birth. It would be both incoherent and unfair towards the parties to the conflict. The Guidelines for a better implementation of the existing Recommendation concerning family mediation and mediation in civil matters (CEPEJ (2007)14) of 7th December 2007 clearly impose duties to National Authorities in many fields : information, education, legal assistance, etc. (ch. 11, 12, 15, 21-26, 30 34, 40-45, 50, 51). Therefore it will be the role of mediation interest circles to jointly remind them to the attention of Authorities, whenever necessary, pleading that it is less expensive for the State to invest in ADR for itself as for the parties.

There is no future for SCP mediation in Switzerland without a fair, efficient and lasting cooperation from and between all mediation interest circles. Mediation, as any other sector of human activity, may be the field of strong competition, controversies and even open struggles. It was and still is sometime the case around us, which gives a counterproductive image of mediation, disrespecting and weakening it. For a better implementation of ADR in Switzerland a Coordination Group was constituted on a national level last summer in Bern, at the initiative of the Swiss section of Gemme. This Group comprises the main associations : the Swiss Lawyers Association, the Swiss Chamber for Commercial Mediation, the Swiss Federation of Mediation Associations and Gemme[69], acting on the national and intercantonal levels, whilst contact groups are being constituted to help public and private sectors to implement ADR and in particular mediation at the cantonal level. Thus the Geneva ADR Contact Group has recently proposed several pilot experiences to the governmental, legislative and judiciary Authorities[70].

There is no future for SCP mediation in Switzerland without implementation measures, because in an "out - of - court mediation "system, the law does not suffice by itself, as already stressed. The information of the public, the sensibilisation of the practitioners, the education of the future lawyers should not remain

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66 *Cf.* Federal Council, Message of 28 th June 2006 on SCP, FF 2006, p. 6860; *cf.* LUSCHER Christian, intervention before the National Council, 06.062, p. 632, 29 th May 2008

67 *Cf.* URY William, BRETT Jeanine, GOLDBERG Stephen, and MANCY François, Gérer les conflits autrement, A2C Medias, Paris, Nov. 2008, p.115; PEKAR LEMPEREUR Alain *et al..,* Méthode de médiation, Dunod, Paris, 2008, p.58 ff and 202 ff*; cf.* also Gemme-CH, ADR Selected Bibliography, Febr. 2009, in www.gemme.ch

68 No statsisics existing, estimations were made under 5 % in France for civil mediation in general (as stated during the Paris Gemme Congress of Dec. 2005), under 5 % for family mediation and less for commercial mediation, in Geneva.

69 A representative of the Swiss Chambers of Commerce has joined the Swiss ADR Coordination Group in Bern

70 Which are recommended by art 401 SCP; *cf.* Mirimanoff Jean A. , Impact de la médiation et de la conciliation selon le CPC sur l'organisation et la pratique judiciaires à Genève, livret remis aux autorités , Dec 2008

indifferent to the public and private sectors, who may share this task, as mentioned in detail in the above - mentioned Guidelines[71].

### 5.4. Main Implementation Measures

5.4.1. Link with Arbitration : the Swiss Rules of Commercial Mediation and their mediation clauses

On April First 2007, the Swiss Chambers of Commerce and Industry[72] have adopted the "Swiss Rules of Commercial Mediation". They suggest *i.a.* Mediation Clauses and Agreements to mediate for the six following situations:

a) Model for contracts : Mediation Clauses for a mediation[73] ; for a mediation followed by international arbitration; and for a mediation followed by domestic arbitration;

b) Model if a dispute is already arisen : Agreements to mediate for a mediation; for a mediation followed by international arbitration; and for a mediation followed by domestic arbitration.

For being effective, such clauses should be included in contracts as often as appropriate, which will depend of on the ADR education of the concerned lawyers. Thus the interdependence of ADR implementation measures is obvious.

5.4.2. ADR Education

It is up to the Law Faculties, maybe jointly with the private sector, to provide a regular, mandatory and sufficient ADR education, both theoretical and practical, for law students or, at least, for young barristers. The changing of judiciary culture will happen mainly through such education[74]

5.4.3. ADR Referral Services (*cf. supra* ch.II )

5.4.4. Pilot experiences (*cf infra* ch.VI )

## VI. Pilot Experience: Towards a Hybrid System?

On the basis of Art. 213 SCP which provides voluntary mediation instead of mandatory conciliation[75] the Geneva ADR contact group's proposal will try to combine the task of the Conciliation with the role of an ADR Referral Service, in suggesting that the future conciliators would be chosen among sworn mediators. The draft needs to be more elaborated, taking into account the teaching of this Forum[76].

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71 *Cf.* CEPEJ ( 2007 ) 14

72 From Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich

73 *Any dispute, controversy,or claim arising out of or in relation to this contract , including the validity, invalidity, breach of termination thereof, shall be submitted to mediation in accordance with the Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce in force on the date when the request for mediation was submitted in accordance with these Rules.*

*The seat of the mediation shall be …(city in Switzerland, unless the parties agree on a city abroad), although the meeting may be held in … (specific place).*

*The mediation proceedings shall be conducted in …(specific language).*

74 At Gemme's initiative, such lectures and workshops are given in 2008 and 2009 to the young barristers of Geneva, with the financial support of the Wilsdorf Foundation, with the logistical support of the Judiciary, and with the moral support of the Bar Association and the Faculty of Law, in order that such ADR programm would be included in the future "*Ecole d'Avocat* " (High School for Barristers); *cf.* Gemme, La gestion des conflits : manuel pour les praticiens, ed. by Mirimanoff Jean A. and Vigneron-Maggio-Aprile Sandra, CEDIDAC, No 78, Lausanne, 2008

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75 *Cf. supra* ch.3.6

76 *Cf. supra* note 70

# VII. Conclusions

According to the International Law Instruments (CoE Resolutions and Guidelines and EU Directives), to Comparative Law and to the Practice, there is no reason to give a preference between "court - connected mediation" and "court - annexed mediation", both of them being efficient for commercial disputes. The choice depends on other criteria : political, financial or philosophical. However the "out - of - court mediation ", without a "connecting body", seems an uncompleted model, thereby inefficient and illusory. A car without an engine. An empty shell. To transform this rather primitive form into a "court - connected mediation" implies initiatives, efforts and costs from the public and the private sectors. It is not by accident that this conclusion is shared in France and here.[77] ADR Referral Services, on the Dutch, American or other models, and education of the practitioners count among many other implementation measures. To leave them would jeopardize the future of mediation, not only in commercial disputes. In the same way such ADR implementation measures are the necessary complement of the Swiss Rules on Commercial Mediation of the Chambers of commerce.

The difficulties and controversies arising in implementing ADR and in particular mediation in some European countries as in Switzerland reflect, as a symbol, the " chaos " which leads from an old order (the State Justice of the XIX$^{th}$ century) to a new one (the plural Justice of the XXI$^{st}$ century). This situation reminds, *mutatis mutandis*, the passage from the unilateral Justice to the democratic Justice described by Eschyle.[78] Like at the time of the poet we can be confident in contributing to this new change as long as we keep in mind and in practice the values taught to the Athenians by Athena instituting her Areopage : democracy, broadmindedness and humility. ***The Human Person is in the heart of mediation, and mediation is in the heart of the Human Person.***

Implementing mediation is not an easy task : it exacts a fair, efficient and lasting cooperation between and among all interest circles, in order to facilitate the event of more spaces of peace, here and elsewhere on our little planet.

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77 *Cf. supra* ch.II

78 *Cf.* de ROMILLY Jacqueline, L'Orestie d'Eschyle, Bayard*, 2006;* MORINEAN Jacqueline, l'Esprit de la Médiation, Ed. Erès, Coll. Trajets, 2001; MIRIMANOFF Jean A., *Digression mythologique sur la résolution des conflits*, *in* Actes de la Journée de la Médiation organisée par l'ENM, Gemme et l'AAMM, Nice, 11th April 2008, *in www.gemme.ch*

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