Guiding the parties towards appropriate resolution of their dispute: A new challenge for the civil judge and three next objectives for the GEMME[1]

JEAN A. MIRIMANOFF[2]

Summary: Introduction. 1. Paradigm shifts. 2. Adjudication and litigation subject matter/ consensualism and conflict. 3. Methodology. 3.1. Conflict analysis through dialogue. 3.2. Active dialogue. 3.3. Time and moment. 3.4. Players' motivation. 4. Indicators and counter-indicators. 4.1. Towards conciliation. 4.2. Towards mediation. 4.3. Towards procedure. 4.4. Towards arbitration?. 4.5. Towards interest-based negotiation?. 4.6. What about hybrids?. 5. The twin sisters. Conclusions for the next decade.

INTRODUCTION

The duty of lawyers to act in the best interests of their clients in conflict management leads them to a "conceptually neutral approach, and the choice of the preferred solution must be based on merit and considered from an analytical and objective point of view"[3]. For lawyers, this theme has been the subject of several studies in the literature, first in the United States and then in Europe[4]. What about the duty of judges to act in the best interests of the parties?. The European Commission for the Efficiency of Justice (CEPEJ) has examined the role of judges in relation to the parties. This is essentially in the context of judicial referral to mediation (JRM)[5], although the holistic dimension of how to approach the question also arises for the judge in view of the three missions entrusted to him by the legislator[6]: conciliate, send to mediation,

1 Note written for the GEMME-Europe AGM on May 24, 2024 and submitted to the Swiss section for its 20th anniversary next September. The author is an honorary magistrate, sworn mediator (Geneva) and accredited mediator (FSM), member of the CEPEJ GT MED (2017-2019), attorney-at-law and former legal advisor to the ICRC.

2 Honorary Judge. Mediator. Lawyer. Contact: mirimanoff [at] mediationgeneve.com.

3 Guide to Mediation for Lawyers, drawn up by the CEPEJ jointly with the Council of Bars and Law Societies of Europe (CCBE), (2018) 7-REV, p. 60, https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52.

4 See for instance Frank E.A. SANDER and Stephen B. GOLDBERG, *Fitting the Forum to the Fuss: A User-Friendly Guide to selecting an ADR Process*. *In*: *Negociation Journal,* January 1994, p. 49-63; its translation and adaptation for civil law countries by Jean A. MIRIMANOFF, *L'Orientation préalable des parties à un différend*. *In*: *Revue de l'Avocat*, Bâle, 1 /2010, p. 14 f. and its latest restructuration by Nicolas DUTOIT, *L'Orientation préalable des parties à un différend, Le rôle des avocats et des protections juridiques*. *In*: Jean A. MIRIMANOFF (dir.), *Genève et la Médiation. Essor des modes amiables de prévention et de résolution des différends et autres démarches de pacification sociale,* Slatkine, Genève, 2023, p. 339 ; Gérard KUYPER *et al., Vers un nouveau rapport entre l'avocat et soin client, Aspects* économiques, *stratégiques et humains*. In: Bénédicte INGHELS (dir.), *La Médiation Autrement,* Larcier, Bruxelles, 2019, p.173.

5 *Guide to the Judicial Referral to Mediation*, CEPEJ, (2018) 7-REV, *op. cit.*, p. 14.

6 See Daniel STOLL, *La Priorité du Règlement à l'amiable et les trois missions du juge civil*. *In*: *Genève et la Médiation.*

conduct the proceedings and judge. The choice of the preferred solution, based on merit and considered from an analytical and objective point of view, can therefore be further developed or at least clarified for judges.

After a reminder of the changes brought about by mediation in the day-to-day life of judges (I), in particular the need to think and examine litigation and conflicts differently (II), and the methods for seeking the appropriate settlement for and with the parties in the courtroom (III), the focus will be more specifically on indicators and counter-indicators for all eligible methods at the stage of referral to the judge (IV), with a digression on the "twin sisters" (conciliation and mediation) still too often confused (V), to conclude on the challenge faced by judges in their day-to-day work of effectively guiding parties towards an appropriate settlement of their dispute, and on three forthcoming support objectives for the Groupement Européen pour la Médiation (GEMME) and its national sections.

1. PARADIGM SHIFTS

The movement that has been underway since the end of the last century[7] in the field of conflict resolution within the judicial world continues to evolve before our very eyes: in the member states of the Council of Europe as well as within this institution[8], under the dual impetus of innovative legislators and committed associations[9] such as GEMME and CCBE. In this context, the support of the judicial authorities, as well as that of each court and, if possible, each judge, is of crucial importance. This change is reflected in both the renaissance of conciliation and the discovery of judicial mediation; it often appears first in legislation, then in practice, even though several GEMME members have proposed judicial referral to mediation (JRM) to the parties as part of their general peacemaking mission, long before the law expressly introduced this method.

Judicial conciliation (compulsory or optional, carried out by the judge or delegated by him or her, as part of a preliminary trial or in the course of proceedings) is enjoying undeniable growth, although this varies from country to country. It is found almost everywhere, and in some cases has existed for a long time. Often practiced by judges themselves, it is generally well accepted, which is not, or only to a minority of cases, the case with judicial mediation[10]. Over the past two decades, under the impetus of GEMME, conciliation has been enriched and revitalized by judges, who introduce mediation tools such as active, non-violent communication and interest-based negotiation, with excellent success rates[11]. The extraordinary success of judicial conciliation in Switzerland shows that it is now in the DNA of Swiss judges[12].

Essor des modes amiables de prévention et de résolution des différends et d'autres approches de pacification sociale, éd. Slatkine, Genève, nov. 2023, p. 329 f.

7 With the first laws on mediation, such as the modification of the CPC in France as early as 1995, and the recommendations of the Council of Europe since 1998.

8 See our article *Le Conseil de l'Europe, soutien indéfectible de la médiation*. *In*: *ANM lettre* N° 8, octobre 2018.

9 See the examples given by Anne Catherine SALBERG, *Petite histoire de la médiation conventionnelle à Genève*, and *La médiation en matière pénale des mineurs*, and by Jean A. MIRIMANOFF, *Justice et Médiation: Changements de Paradigme* (1998-2023). *In*: *Genève et la Médiation, op. cit.*, p. 97 f, 109 f et 153 f.

10 The introduction of the ARA represents a new form of mediation in France, of an intra-judicial nature, alongside mediation entrusted to a third party external to the court; see Béatrice BLOHORN-BRENNEUR and François STAECHELE, *Présider les audiences de règlement amiable*. *Devenir juge de l'ARA*. *In*: *La Médiation pour tous*, L'Harmattan, Paris 2023; F. Vert, *L'audience de règlement amiable: quelles avancées pour l'office conciliatoire du juge?*. *In*: *Actu-Juridique.fr.,* 6 avril 2023.

11 See Pierre STASTNY, *La Commission de conciliation en matière de baux et loyers, une institution à cultiver et à transmettre*. *In*: *Genève et la Médiation*, *op. cit.*, p. 67 f.

12 With rates ranging from 30 to 90% of civil disputes, depending on the canton, as a preliminary trial or even by the judge

In practice, therefore, litigation has become subsidiary and alternative to conciliation, as is the case in many Swiss cantons. The same cannot be said of judicial mediation, i.e. mediation carried out when the dispute is already before a court.

In this respect, it should be noted that the conceptual evolution of judicial mediation has been as rapid as it has been baffling for judges, most of whom have received no training to prepare them for it[13]. Initially, it was qualified or recognized as an alternative, i.e. subsidiary or accessory, alongside or separate from conciliation, which magistrates still struggle to distinguish. It is then presented as a priority, for example in the explanatory memorandum to the Swiss Code of Civil Procedure (CPCS)[14]. However, this idea is not reflected in the text of the Swiss law itself, which leaves each judge to do as he or she sees fit. Judges may be tempted to act according to their perception of the usefulness of mediation for themselves, and not for the parties! As practice is slow to adapt to the new law, the subsidiary role conferred on civil procedure does not generally permeate either minds or practice when it comes to mediation and its evolution. Finally, in view of the low number of cases referred to mediation[15], there have been attempts, in GEMME debates and elsewhere, to remedy the situation by imagining an oxymoron: compulsory mediation[16], for all parties or just one of them[17], which would be a panacea for all the ills of youth. A vain illusion[18]. It was only recently that the solution – in our view a decisive one – was proposed by the legislator: the obligation for judges to encourage mediation in all suitable cases[19], and the obligation for judges to make mediation access available to all parties[20].

What's more, there is a major misunderstanding among judges in our countries, who believe that mediation is designed to relieve the burden of justice. Yet mediation, by its very nature, methods and objectives, and above all by its spirit, is anything but a discharge[21]. There can be no effective and relevant judicial referral to mediation on the basis of this criterion.

Another unfortunate misunderstanding is the idea that conciliation and mediation are interchangeable, and that by not considering conciliation, or by failing to conciliate, we are at the same time forgoing mediation. In Switzerland, under the CPCS, mediation can certainly replace conciliation, whether at the preliminary attempt stage or in proceedings on the merits, but this does not mean that these methods are identical: they are not identical in their approach, objectives or spirit (see V below).

(who remains seized if his attempt fails); as recently as 2000-2010, the rate of civil conciliation was less than 5% in Geneva, whereas in lease and rental disputes the rate exceeded 50% of such disputes, using the tools of interest-based negotiation.

13 To the best of our knowledge, France was the first country to introduce a course on amicable settlement and practical workshops in its Ecole Nationale de la Magistrature (ENM), often run by members of the French section of GEMME; to our knowledge, no Council of Europe country has introduced compulsory continuing education for serving judges, situation which explains the present stagnation of judiciary mediation.

14 FF 2006 6860.

15 At the time of the 10th anniversary of mediation in the CPCF in 2005, the rate of referrals to mediation was estimated at around 1% of civil litigation, a figure which is at the same level in Switzerland 10 years after the introduction of mediation in the CPCS.

16 The obligation to participate in the process violates both the voluntary principle of mediation and the freedom of individuals to contract; on the other hand, the obligation to attend an information session on the process is admissible.

17 See Alice DESJOLLIER *et* Bénédicte INGHELS, *La Mé*diation *Judiciaire: quels regards croisés entre le juge et l'avocat?*. *In*: *La Médiation Autrement*, Larcier, Bruxelles, 2019, p. 51 f. not. 67 f.

18 There is no evidence that this idea has increased the rate of JRMs and the rate of mediation settlements; on the other hand, the obligation to attend an information session seems more judicious.

19 Injunction whose application in practice is likely to be questioned as long as it has not received an implementing regulation.

20 See our contribution *Justice et Médiation*, *loc. cit. In*: *Genève et la Médiation*, *op. cit.*

21 On the other hand, judicial referral may have the *effect* of relieving the judge's workload, which is not the same thing.

Raising judges' awareness of conflict management, including mediation, will help dispel these sources of confusion. But when the judiciary itself is opposed to raising awareness, how can we move forward? How can judges properly carry out this orientation in the frame of the three missions entrusted to them by the legislator? And, more importantly for our purposes, how can they help the parties make a free and informed choice to resolve their problems?

2. ADJUDICATION AND LITIGATION SUBJECT MATTER/CONSENSUALISMO AND CONFLICT

It is only by comparing the various methods of dispute resolution[22] with a view to their judicious use that we can better understand what characterizes and distinguishes those based on adjudication (state or arbitration proceedings) from those based on consensualism (conciliation and mediation). The former are designed to resolve the object of the dispute, identified by the parties' conclusions, and outside which the magistrate cannot venture (*nec ultra petita*), while mediation enables the parties to attempt to resolve their conflict, in whole or in part, by expressing themselves through the emotions, feelings, values and other sensations of the human person; as for conciliation, it is open to both approaches[23]. Theoretically, legislation allows for the free flow of disputes between civil proceedings and amicable procedures, conciliation and mediation[24]. In practice, this circulation does not work, or works poorly, in the case of mediation. To remedy this, the judge needs to master the switches needed for this flow, if we want to facilitate the parties' transition, with their help and the support of their counsel, from civil procedure to another mode that proves more suitable for them.

Raising awareness of conflict management, including mediation, is the key to encouraging and facilitating the orientation of parties towards an appropriate resolution of their dispute in the day-to-day practice of law. This implies a methodology enabling the judge, the parties and their counsel to identify the most appropriate method.

Consensualism is not opposed to justice, quite the contrary, since it has a threefold pacifying effect: it prevents the conflict from escalating, it resolves the conflict and it prevents new conflicts, whereas judgment only puts an end to the litigation[25].

3. METHODOLOGY

In order to effectively select the most appropriate regulation, several steps are necessary, most of which take place during an orientation hearing dedicated to this objective.

3.1. Conflict analysis through dialogue

It is during a hearing in which the parties appear that the judge can enter into a dialogue with them and, with the support of their counsel, enabling him to diagnose the conflict, *i.e.*, to assess whether or not the parties are willing or able to enter into negotiations, which

22 On these concepts see the Lexies to these names in our *Dictionnaire de la Médiation et d'autres modes amiables*, Bruylant, Coll. Paradigme, Brussels, 2019.

23 The Swiss legislator encourages it by allowing the parties to leave the subject of the litigation (art. 201 al. 1, 2nd sentence CPCS); see Sandra VIGNERON-MAGGIO-APRILE, *Interactions entre procédure civile et modes amiables*. *In*: Jean A. MIRIMANOFF (éd.), *La résolution amiable des différends en Suisse*, Stämpfli Ed., Berne, 2016, p. 68-70.

24 See our article with Sandra VIGNERON, *Pour une libre circulation des différends civils et commerciaux (Réflexions sur les nouveaux réseaux de la justice plurielle: le cas suisse dans le contexte européen)*. *In*: *RDS* Avril 2007, p. 21 f.

25 See Thierry GARBY, *La Gestion des conflits*, CMAP, Economica, Paris, 2004, p. 6

amounts to measuring the level of escalation of the conflict[26]. During this hearing, the judge is in a position to answer the parties' questions, in particular as to the most appropriate mode for their concrete case, to evoke the advantages that the parties would derive from it and to refute the objections formulated by them and, if need be, to persuade or incite them to resort to the mode that emerges as being the most appropriate according to their needs.

3.2. Active dialogue

Active and non-violent communication methods enable judges to improve their relations with the parties, both in the context of this hearing and more generally. Thus, they will facilitate the search for and expression of the parties' interests, concerns, needs and motivations (ICNM), which will guide the players in the dialogue towards the discovery of the appropriate resolution to the case in question. And, when the time comes, these methods will enable the magistrate to recommend or urge the parties to resort to them, in the right tone and with the right words. The CEPEJ Guide to the JRM, the viatic of the modern magistrate, specifies in this respect what should or should not be done, in a style of persuasion and in a style of incitement.

3.3. Time and moment

The time factor is doubly important: whether or not it's the right time for the parties to start negotiating, and how much time is available for the judge to accompany the negotiations. The judge's time is not wasted: experience shows that agreement on the process triggers and stimulates agreement on the conflict. It can be estimated that conciliation takes between thirty minutes and several hours, whereas mediation is generally more time-consuming. And JRM is certainly less time-consuming than conciliation. So, the more time a magistrate has available, the more inclined he will be to conciliate the parties himself, and vice versa.

3.4. Players' motivation

a) That of the parties

As in the case of lawyers, but within the limited framework of the three missions entrusted to them, the judges can help the parties to choose the most appropriate solution for them at any given time, *i.e.*, the one most in keeping with their ICNM. The motivation of the parties takes precedence over that of the judge. Helping the parties to make this choice in a free and informed manner requires the judge to have not just information, but knowledge and experience commensurate with this new challenge.

b) The judges

Judges can legitimately consider the benefits of mediation for the judiciary:

> the possibility of referring suitable cases to mediation can improve the overall efficiency of the judicial system, since if the number of cases resolved through mediation increases, judges will have more time to manage and judge the remaining cases;
> - referral to mediation puts an end to the conflict as a whole (and thus to any temptation on the part of the losing party to retaliate by bringing an appeal or other legal action);

26 See the Lexie *Etapes/Escalade du conflit* in our aforementioned *Dictionnaire de la Médiation et d'autres modes amiables* and the bibliography cited, including the contributions by Fr. GASL, p. 229.

- even in the remaining cases, mediation goes some way to smoothing out differences and appeasing the parties, so that subsequent proceedings can be significantly reduced;
- referral to mediation enables the parties to settle their disputes in a timely, efficient and customized manner, which contributes to a positive image of the judicial system[27].

4. INDICATORS AND COUNTER-INDICATORS

There are no legal criteria on which the judge can rely to guide the parties towards the appropriate settlement, but a series of indicators and counter-indicators derived from the vast judicial pilot experiment extended nationwide in the Netherlands over a whole decade[28]. Its initiator, Judge Machteld PEL, has produced a major work of reference for the development of judicial mediation in Europe: *Referral to Mediation*. *A practical Guide for an effective mediation proposal* (SdU Uitgevers, The Hague, 2008). Ten years later, the CEPEJ's working group on mediation drew on this work to prepare its *Toolkit for the Development of Mediation*, and in particular its *Guide to the Judicial Referral to Mediation*[29].

The only regret is that these indicators are focused on mediation. We therefore need to develop them for conciliation, and specify the relevant counter-indicators for procedure. In this way, we will have marked out the pathways leading to the different modes of resolution in terms of the choice made at the parties' orientation hearing.

The first question is: since amicable settlement is presumed to have priority (which will be tested at the orientation hearing), how will the judge position himself in relation to the "twin sisters": conciliation and mediation?

In Switzerland, there is an abyssal gap between the use of conciliation by the civil judge, which is widespread and effective in all cantons[30], and judicial referral to mediation, which is barely perceptible[31], despite the introduction of this method in the new unified code of civil procedure of 2011 (CPC). This discrepancy can be explained by the custom of conciliation in the German-speaking cantons, by the system introduced by the CPC which favours conciliation, and by the lack of awareness of mediation among judges.

Since the CPC came into force, the judge's switch between conciliation and mediation has been between compulsory conciliation for most civil matters during the preliminary attempt (art. 197 CPC), with exceptions (art. 198 CPC) and dispensations (art. 199 CPC), and before the trial judge for the unilateral petition for divorce (ATF 138 III 366), while mediation can replace the preliminary attempt at conciliation if all the parties so request (art. 213 CPC) or at any time during the proceedings on the judge's initiative (art. 214 CPC).

27 See our aforementioned *Dictionary*, pp. 76-77.

28 See Machteld PEL *et al.*, *Customized conflict resolution: Court-connected Mediation in the Netherland, 1999-2009, a prepublication at the occasion of the conference Moving Mediation*, The Hague, 19 nov. 2019.

29 CEPEJ ("2018) 7-REV, in particular page 3 which will be quoted below, https://rm.coe.int/mediation-development-tool-kit-ensuring-implementation-of-the-cepej-gui/16808c3f52.

30 Around 30% of civil litigation in Geneva, 60% in Berne, 70% in Zurich and... 90% in Basel-Stadt.

31 Still below 1% of civil court litigation, with progress towards 10% in civil chambers whose judges are aware with mediation; see the Rapport sur la Pratique de(s) tribunaux civils de première instance sur le RJM dans le cadre des art 213, 214 et 297 CPC et 301 CC, available on the CEPEJ website, https://rm.coe.int/rapport-rjm-final-coe/1680982b8a.

4.1. Towards conciliation

On the basis of the work of the European Commission for the Efficiency of Justice (CEPEJ), in particular its working group on mediation[32], indicators and counter-indicators have been identified in the literature[33], which proposes methods of use on a pragmatic basis: thus, Nicolas DUTOIT proposes the following:

Common indicators in favor of conciliation and mediation, as opposed to continued litigation, are as follows:

1. Cost of conflict resolution;
2. The need for a rapid solution;
3. Controlling the conflict and finding a tailor-made solution;
4. Maintaining relations between the parties;
5. High emotional content.

With a tendency towards conciliation for the first two indicators, and a tendency towards mediation for the next three. For mediation, we can add a sixth indicator of its own: the prospect of a personalized, customized and better-adapted solution.

4.2. Towards mediation

The CEPEJ's *Guide to Mediation* gives the following examples in favour of mediation:

- The interests of the parties are broader than the legal framework of the dispute;
- Long-term relationships (neighbors, professional life, family, etc.);
- Parties other than those involved in the proceedings are involved in the conflict;
- Other pending proceedings involve the same parties;
- A rapid resolution of the dispute is desirable;
- The cost of the dispute is disproportionate to its value;
- One of the parties has few resources to devote to legal proceedings;
- Litigation fatigue;
- High probability that the case will be complicated to decide;
- Likelihood that the judgment will be difficult to enforce;
- Uncertain outcome of proceedings;
- Mutual future interests;
- Highly emotional case;
- Need for privacy and confidentiality of parties (in camera proceedings);
- Importance of controlling the timing and organization of the process.

It goes without saying that, in theory, all these indicators can be combined, although it should be noted that, unlike lawyers, who can carry out a wide-ranging preliminary orientation[34], first with their clients, then between the parties (alone with their lawyers, or with an independent conflict manager), judges stick to their three missions.

---

32 The Guide to the Judicial Referral to Mediation and the Guide FAQ on Médiation, included in the Mediation Development Toolkit, CEPEJ website: https://rm.coe.int/mediation-development-toolkit-ensuring-implementation-of-the-cepej-gui/16808c3f52 and themselves inspired by Judge Machteld PEL's magisterial work, Referral to mediation, a practical guide for an effective mediation proposal, SdU Uitgevers, The Hague, 2008.

33 See in particular the contributions by Nicolas DUTOIT, *La conciliation en matière civile, indicateurs et contre-indicateurs* and by Sandra VIGNERON-MAGGIO-APRILE, *La médiation en matière civile, indicateurs et contre-indicateurs*. *In*: Jean A. MIRIMANOFF (Dir), *Genève et la Médiation. Essor des modes amiables de prévention et de résolution des différends et d'autres approches de pacification sociale*, éd. Slatkine, Genève, 2023, pp. 89 f et 95 f.

34 See Nicolas DUTOIT, *L'Orientation préalable des parties à un différend: Le rôle de l'avocat et des protections juridiques*. In: *Genève et la Médiation, op. cit.*, pp. 389 f.

By choosing mediation wisely, the judge perfectly serves the judicial institution, which will also benefit from mediation's triple pacifying effect: preventing the conflict from escalating, resolving the conflict and preventing the emergence of new conflicts[35].

4.3. Towards procedure

Conversely, according to Nicolas DUTOIT, three counter-indicators are common to both conciliation and mediation, and a contrario favourable to litigation:

- *The need to hand over the decision to a third party*;
- *The facts are not in dispute and there is a significant chance of success for one party*;
- *The need to obtain a legally binding and published decision*.

And according to the JRM CEPEJ Guide, they are against mediation and in favour of trial:

- Failure of a recent mediation attempt;
- Wish to establish a precedent;
- Desire to establish a public decision;
- Profound imbalance of power, excessive pressure or previous use of violence between the parties that cannot be managed by the mediator and/or may result in a notable absence of free and informed consent on the part of one of the parties;
- Likelihood that the decision will be unfair to at least one of the parties involved;
- Lack of full and general negotiating power on the part of the parties and their lawyers;
- Proven parental alienation.

4.4. Towards arbitration?

While many national laws welcome arbitration, a private mode of adjudication also based on legal syllogism and focused on the subject matter of the litigation, none to our knowledge deals with a possible switch from civil to arbitral proceedings. This absence of a link seems justified a priori, since we can expect that both methods – which are sufficiently well known – will have been chosen freely and in an informed manner by the parties. However, our practice suggests that one exception should be considered. When the offer of evidence provides for letters rogatory to be sent abroad, would it not be justified for the judge and expected of the parties to inform them of cases where a rogatory commission will not be executed, or will be executed very late, according to the court's experience or the information provided by the Ministry of Justice? Indeed, such situations are not always known, and are sometimes unimaginable (for example, when a Council of Europe country is involved); arbitration then makes it possible to circumvent these obstacles through the institution of affidavits, not always recognized by state courts.

4.5. Towards interest-based negotiation?

This question is of no practical interest: we can assume that those counsels, still in the minority, who are familiar with this method (which consists in separating emotional management from interest-focused negotiation), will have already taken action prior to the orientation hearing, and that those who are not yet familiar with it will not suddenly improvise it effectively. On the other hand, the judge himself will use this method to good effect in supporting the parties' negotiations at the orientation hearing, as he could do in his own conciliations.

35 See Thierry GARBY, *op. cit.*, p. 6.

4.6. What about hybrids[36]?

At the time of the hearing, some of the issues between the parties may lend themselves to amicable settlement. In practice, this method of splitting the proceedings is known and encouraged, leading to partial agreements in mediation, which the judge may approve where appropriate, while proceedings continue on the other contentious points. It should also be noted that in the mediation process (judicial or conventional) it is possible to resort to other methods of settlement in parallel, such as expert appraisal, decision on the last offer or arbitration.

5. THE TWIN SISTERS

Conciliation and mediation share a number of common aspects linked to consensualism. They are both forms of assisted negotiation, with the third party taking a rather directive approach in conciliation, and a rather facilitative one in mediation. But what else? In Switzerland, the CPCS gives conciliation a kind of privilege, since it precedes mediation, which can replace it. Thus, in the CPCS, they appear to be procedurally interchangeable, whereas they are substantially different.

Discussions within the GEMME and the work of the CEPEJ have clarified their specific features. Conciliation is originally *evaluative in nature*, *i.e.*, it gives the third-party judge, during the pre-proceedings trial, the opportunity to express his or her opinion on the respective merits of the parties' conclusions, by means of an anticipated assessment of the evidence, a legal analysis and a legal syllogism. When this exercise is carried out in the course of proceedings, as is possible in Germany and Switzerland, the risk of prejudging may arise. On the other hand, mediation, as practised in countries with a civil law (or Romano-Germanic) tradition, is *non-evaluative in nature*, with the third party even refraining from giving his or her opinion on the conflict, which would be contrary to the neutrality of the process. Thus, we can note that: conciliation is generally designated as an informal[37] and confidential process by which a third party *(neutral, independent and impartial) leads the parties to a solution to their litigation, or proposes one of his or her own, and Mediation is generally designated as a structured*[38], *confidential process whereby a third party (neutral, independent and multi-party) facilitates communication between the parties and enables them to find a solution to their dispute.*

When the judge uses the tools of mediation in conciliation, the difference becomes less marked, particularly if the conciliating judge has to deport herself or himself if her or his attempt fails, which is not the case in Germany or Switzerland (but the Federal Chambers will be debating this further[39]). And in common law countries, the institution known as mediation covers both concepts (with the nuance of evaluative mediation for conciliation, and not evaluative mediation for mediation[40]).

Judicial practice in civil and commercial matters and workshop exercises conducted under the aegis of the Foundation for Continuing Education of Swiss Judges (Gerzensee, Berne) have

36 See the eponymous Lexie in our Dictionary, *op. cit.*, p. 273 and its bibliography.

37 Nevertheless, there are several approaches for framing conciliation: quasi-good offices, quasi-mediation, quasi-amicable composition and quasi-procedure; see our *Dictionary, op. cit.*, under conciliation.

38 *For example, the method recommended by Thomas FIUTAK, Le Médiateur dans l'arène, érès, trajets, Paris, 2004.*

39 See David Hofmann, *La conciliation en matière civile*. In: *Genève et la Médiation, op. cit.*, pp. 49 f, not. 63

40 See Stephen B. GOLDBERG *et al*. *What a Difference Does a Robe make? Comparing Mediators with and without Prior judiciary Expérience*. *In*: *Negociation Journal,* Harvard, July 2009, p. 277 f.

shown that everything that lends itself to conciliation can lend itself to mediation, and not the other way round: some cases may not lend themselves at all to conciliation, but very well to mediation. For example, so-called complex cases or those involving numerous parties (in the field of inheritance, where co-mediation is a great help), whenever one of the six indicators set out above in favor of mediation appears. Thus, the complementary role of mediation compared to conciliation can no longer be seriously questioned, it being specified that the system of mediation delegated to a third party is all the more justified as the civil judge in Switzerland has neither the training, the time nor the legal competence to practice it himself.

CONCLUSIONS FOR THE NEXT DECADE

The vision of a modern justice system that is both conceived in the interests of the parties (individuals and legal entities) and in line with the will of the legislator will be holistic, so as to be able to respond to each concrete situation. It already includes, without hierarchy, both traditional adjudication-based methods, such as state or arbitration proceedings, and amicable methods, such as judicial conciliation and mediation.

The question of what is or is not adequate to enable the parties to the conflict to resolve it depends on the analysis that can and must be made by the magistrate seized of the dispute in *each individual case*. Guiding the parties towards an appropriate resolution of their conflict represents a means of achieving a solution that is both effective and in line with their expectations and, philosophically speaking, with our conception of justice.

When it is advocated that amicable settlement has priority, as in the message introducing the Swiss Code of Civil Procedure (FF 2006 6860) or in the literature[41], this is merely a presumption whose validity must be tested at the parties' orientation hearing in each individual case by the judge.

Today, each civil magistrate is called upon to dialogue with the parties and their counsel on the most appropriate approach, taking into account the following elements: conflict diagnosis, intervention plan, survey of the parties' willingness to negotiate, analysis of the level of escalation (or level of conflict) and information on mediation[42]. In this context, GEMME, its national sections and individual members can make their contribution by supporting three objectives with the relevant authorities, to help overcome the current situation:

1) Make this orientation an obligation for civil judges, whether in law, regulations or internal guidelines;

2) Provide all civil judges with initial and ongoing awareness-raising training (*e.g.* every 3 years), as recommended by the CEPEJ, with the possibility of using the program it has devised for each of these two stages;

3) Systematically collect statistics to measure the effectiveness of the system put in place[43] (without which it is impossible to know whether or not we have emerged from the current situation of stagnation) and to know:

a. The number or rate of referrals to judicial mediation, *i.e.*, those followed by an effective commitment by the parties to enter mediation;

b. The number or rate of Mediation Settlement Agreements, *i.e.*, processes leading to a global or partial settlement agreement, here again, the CEPEJ Toolbox can provide models.

41 See Thierry GARBY, *op. cit.,* note 23; Stephen B. GOLDBERG, *loc. cit.,* note 2.

42 See Appendix 1, point 1, of the Mediation awareness program for judges, drawn up jointly by GEMME and the CEPEJ, CEPEJ website, https://rm.coe.int/cepej-2019-18-en-mediation-awareness-programme-for-judges/168099330b.

43 Idem for conciliation. In several Swiss cantons conciliation statistics exist and are related with specified fields such as family litigation, labor litigation, rent and leese litigation, etc.

Access to amicable settlement is the counterpart to access to a fair trial. GEMME's role over the next decade, whether at European level or through its national sections, will be crucial in putting an end to the situation that prevails almost everywhere in the member states of the Council of Europe, with few exceptions: that of random access to amicable settlement, and particularly to judicial mediation, both in its extra- and intra-judicial forms. These uncertainties stem from the fact that parties are referred to mediation or not, depending on whether or not the magistrates hearing their case are aware and trained with mediation. Indeed, it is the magistrate handling the dispute who holds the key to free access to judiciary mediation! It is the magistrate who gives the impetus to the parties, and if he or she refers them to a permanent mediation office, the latter may supplement the information given at the hearing and usefully relieve the magistrate of the burden of choosing a mediator. It can never replace the magistrate as the initiator of the JRM, as it does not have the authority of a magistrate.

The three proposed objectives will put an end to the judicial lottery that has insidiously taken root as a result of this situation, for one or even several decades now, depending on the country. This situation must first be recognized by the judicial authorities if it is to be effectively combated, since it is contrary to the equal treatment of the parties as well as to the principles of quality and efficiency of Justice, which are dear to the CEPEJ and dear to all our hearts. Guiding the parties towards an appropriate settlement of their conflict thus represents a new challenge[44] for the civil judge and for GEMME over the next decade: amicable settlement has priority. Judges conduct and judge cases as long as these are not suitable for conciliation and mediation.

44 The other challenge is undoubtedly the introduction of artificial intelligence (AI) into judicial life. AI could help to eliminate the situations of delay bordering on denial of justice still encountered in several member countries of the Council of Europe, thus making judicial institutions more efficient than they are today. On the other hand, it could lead to the replacement of our civil law system by that of the common law, which would be a fatal blow to the identity and legal and judicial independence of continental Europe.