

# REPORT ON LAWYERS' AND SOLICITORS' PRACTICE IN THE FIELD OF MEDIATION

## To the CEPEJ GT MED

(Sample survey in Switzerland of the impact of the CEPEJ Guidelines n° 14)

### Abstract

THE CEPEJ Guidelines 2007 No 14 on the implementation of family and civil mediation recommendations concerns both public and private sectors. The role and the awareness (including training) of lawyers (and therefore also solicitors) are mentioned in pars 1.3 and 3.4 of these Guidelines. This survey – the first of this kind conducted in Switzerland - aimed at two objectives: on one hand to study the impact of the CEPEJ Guidelines and of the national legislation on practice of lawyers and on the other hand to contribute to make these professions aware of the new opportunities that mediation offers to them.

With the support of the Swiss Federal Tribunal General Secretary, and the active collaboration of the three Presidents of the Geneva, Friburg and Vaud Lawyers 'Associations and of the President of the Swiss Federal Solicitors Federation, a survey, by mean of two questionnaires was organized in September 2017, with its results analyzed and commented in October 2017.

The questionnaire was sent to around 3000 lawyers (out of a total of 11.500 lawyers in Switzerland), therefore presenting circa 25 % of the Swiss Bar members, and the other questionnaire was sent to the Solicitors Cantonal Chambers. Around 30 % of the Lawyers of Friburg answered the questions on ten selected and precise subjects (Taken from above mentioned paras of GL No 14), but only around 2 % in the other two cantons. Nevertheless the results are significative, showing several differences and some common points inside Switzerland, which may similarly be reflected across Europe.

The report contains, for each question, a summary of the answers, given by these associations, through figures, synoptical diagrams together with author's comments and conclusions.

All the material of this survey, conceived without mentioning national legislation provision (except one question on 20) will be taken, in case of interest, at the free disposal of other Lawyers and Solicitors Associations, inside and outside Switzerland.

## Chapter 4. RECOMMENDATIONS AND CONCLUSIONS

### 4.1. Dissemination and understanding of the guidelines

In Switzerland, the guidelines have not reached their main targets in the private sector (lawyers), the public sector (judges) or the mixed sector (notaries)<sup>1</sup>. Given the continuing high standard and relevance of their recommendations, **if mediation is to be expanded in the member states in Europe<sup>2</sup>, it seems vital to disseminate the CEPEJ's 2007 guidelines effectively so as to reach these key stakeholders<sup>3</sup>**. Bar Chairs, the Presidents of Chambers of Notaries and court presidents in the member states must at last have

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<sup>1</sup> Depending on the individual canton, notaries are either civil servants or self-employed professionals with official powers.

<sup>2</sup> By the Secretariat, the national representatives or the CEPEJ as such ?

<sup>3</sup> The texts of the CEPEJ's 2017 guidelines N° 13, 14 and 15 are available and accessible in several languages on the website of the Council of Europe's Commission for the Efficiency of Justice.

access to them, with a brief explanatory memorandum focusing attention on the importance of the guidelines in daily practice and how they should be understood.

This supporting memorandum should highlight the interdependency of the recommendations set out in the guidelines, which form a whole. Their implementation requires a holistic, systemic, dynamic, interdisciplinary and flexible approach. Interim reviews will need to be carried out, and changes made, for instance, along the lines of the large-scale trials conducted in the Netherlands over a ten-year period (1999-2009)<sup>4</sup>.

If a mediation unit is to operate and progress within a court, for instance, the lawyers and judges running it must have both been properly introduced to mediation, must co-operate in the same spirit of service and must therefore be primarily concerned about the needs and interests of their clients or court users. They must have the humility to reconsider aspects which have not proved successful, to consult, to listen and to refer to other pilot projects<sup>5</sup>, taking care also to call on IT specialists, statisticians and analysts, etc.

Picking out individual measures from the guidelines and applying them in isolation is pointless: the mediation information unit (PIM) in Geneva is withering away for lack of proper acknowledgement, support or input from the members of the bar and the judiciary.

#### 4.2. Recommendations for lawyers

It is possible to move forward in two directions:

- 1) Set out a number of additional recommendations,
  - 2) Develop a few tools which are missing.
- 1) In the memorandum sent out with the guidelines, emphasis could be placed on:
    - a) The need to introduce for lawyers (and for judges) **compulsory awareness training** in law (and judicial) schools, comprising some two to six modules made up of presentations, workshops and round tables, if possible with an exam leading to **a certificate**.
    - b) The need to encourage the establishment of **mediation centres** or **units** in courts, on the initiative of the most committed, and obviously under judicial supervision but with active input from lawyers and mediators<sup>6</sup>.
    - c) Reminding lawyers (and notaries) of the benefits of **enforceable authentic instruments** to back up (final) **mediation settlements**, in particular in international disputes, and of **contractual mediation clauses** to prevent or resolve disputes upstream<sup>7</sup>.
    - d) Reminding lawyers of the usefulness of holding **annual mediation open days** in courts or elsewhere, if possible with the involvement of judges.
  - 2) As tools, the CEPEJ-GT-MED could develop the following for lawyers in 2018:
    - a) Model **mediation clauses** and multi-tier clauses;

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<sup>4</sup> Cf. Machteld PEL, Customized conflict resolution : Court-connected Mediation in the Netherlands, The Hague, 2009

<sup>5</sup> Through the network of pilot courts in the member states that refer cases to mediation (cf. *Infra* note 39).

<sup>6</sup> In this connection, a « *Network of pilot courts in the member states that refer cases to mediation* » of the kind that already exists in embryonic form in Belgium, France and Switzerland in the civil (family, civil and commercial and social), criminal (adults and minors) and administrative fields could be set up and updated within the Secretariat.

<sup>7</sup> These two tools should be highlighted given the way they work preventively, economically and effectively.

- b) A model *section for laws on lawyers* including the *obligation for lawyers to inform their clients about mediation when the circumstances are appropriate and advise them to have recourse to it when the clients' needs and interests so require*, and pointing out that *failing to do so already constitutes professional misconduct*;
- c) The establishment (for judges and for lawyers) and the updating every two years of a *“Network of pilot courts in the member states that refer cases to mediation”* on the basis of the lists that exist for Belgium, France and Switzerland in civil matters (family, civil and commercial, social), criminal matters (adults and minors) and administrative matters; these lists will be useful for setting up pilot projects and *highlighting the respective roles of lawyers* and other stakeholders in this context;
- d) Renewing *every two years the survey on the practice of lawyers* and notaries concerning mediation so as to monitor its development; and - a point affecting lawyers only indirectly:
- e) Draw up a *straightforward and easy-to-use statistical template* for the number of cases referred to mediation.

#### 4.3. Recommendation for notaries

In the memorandum sent out with the guidelines, emphasis could also be placed on:

- a) The benefits for notaries of *familiarising themselves with mediation techniques*, which should make their tasks as facilitators between their clients more effective,
- b) The benefits for notaries' clients of the instruments drawn up by notaries including *mediation clauses* to prevent or settle amicably problems or disputes of all kinds beforehand,
- c) The benefits for notaries' clients of instructing notaries to draw up *enforceable authentic instruments* after mediation settlements so as to strengthen the latter and give them the force of judgments, which would mean savings in terms of time, energy and money in cross-border disputes in particular.

(Translated with the kind support of Jeremy TAGG Esqr)