

# Compulsory Mediation as a Prerequisite before Commencement of Court Proceedings -

## Useful Requirement to Save Resources or Waste of Time and Money?

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### 1. Introduction

Complex litigation is expensive and time-consuming. Complex cases do not only use large amounts of court resources, but also prevent parties from using their resources in a more productive manner.<sup>1</sup> Therefore, any means with a substantive prospect of success to avoid court proceedings should be adopted.

Mediation is a negotiation process in which a mediator assists the parties to achieve their own resolution of the dispute. Mediation as a prerequisite for commencement of court proceedings sounds like a magic potion: huge resources could be saved if the parties can settle the dispute at an early stage. In particular fields of law, where mediation is mandatory, the settlement rate amounts to 70%-89%.<sup>2</sup> Despite these figures, Australian law generally does not require the parties to use mediation before commencement of court proceedings.

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<sup>1</sup> Michael Legg, *Case Management and Complex Civil Litigation* (2011) 1, 123; Dorne Boniface, Miiko Kumar and Michael Legg, *Principles of Civil Procedure in New South Wales* (2<sup>nd</sup> ed. 2012) [2.70].

<sup>2</sup> Tom Altobelli, 'NSW Supreme Court makes mediation mandatory' (2000) 3(3)(3) *ADR Bulletin* (available at <http://epublications.bond.edu.au/adr/vol3/iss3/3>) 43 f.; see also Monica Del-Villar, 'Mediation in Australia' (2005) #105 November/December 2005 *Australian Construction Law Newsletter* 34, 36.

This paper assesses whether compulsory mediation before commencement of court proceedings has substantial prospects of success in complex commercial litigation. If the answer is in the affirmative, mediation should be compulsory before any action can be brought before the court. If the answer is negative, a requirement to first undertake mediation would be a waste of time and money – and, in effect, be contraproductive to the aim of a quick and cheap dispute resolution.

This paper will also examine the situation in Switzerland, where the parties generally must undertake some attempts of pre-action dispute resolution. Figures show that around 50-75% of the disputes brought before the Swiss 'conciliation authorities' can be resolved at this early stage.<sup>3</sup>

However, taking into account the particular circumstances in complex commercial litigation, compulsory mediation before commencement of court proceedings seems to be either unnecessary or pointless, or can even cause a barrier to justice.

This paper starts with an assessment of the existing obligations of prospective parties with respect to mediation in Australia (below ch. 2). After that, I will set out the legal situation in Switzerland after enactment of the new Swiss Civil Procedure Code of 19 December 2008 (SCPC, SR 272) on 1 January 2011 (ch. 3). After identification of the main factors which are crucial for successful mediation (ch. 4), we will be able to decide whether mediation should be adopted as a prerequisite in complex commercial litigation (ch. 5).

## **2. Pre-litigation Requirements for Mediation in Australia**

### **2.1. Definition of Mediation**

There is no unanimous understanding of 'mediation'.<sup>4</sup> Mediation is typically described as 'facilitated negotiation'<sup>5</sup> between the parties to a dispute. The mediator is neutral, (usually) chosen by the parties and simply helps the parties negotiate.<sup>6</sup>

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<sup>3</sup> See in detail below 3.4.

<sup>4</sup> See Robyn Carroll, 'Trends in Mediation Legislation: "All for One and One for All" or "One at All"?' (2002) 30 *Western Australian Law Review* 167, 193.

<sup>5</sup> Stephen Ware, *Principles of Alternative Dispute Resolution* (2<sup>nd</sup> ed. 2007) 265; Boniface, Kumar and Legg, above n 1, [4.220].

In contrast to litigation and arbitration, the mediator does not decide the result of a case.<sup>7</sup> Mediation can produce legally binding results only with each party's consent to that result by entering into a settlement agreement.<sup>8</sup>

In short, mediation can be defined as 'negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute'<sup>9</sup>.

According to some sources, mediators have a *facilitative* role only. These authorities understand that a mediator 'has no advisory [...] role in regard to the content of the dispute [...], but may advise on or determine the process of mediation'<sup>10</sup>. A *conciliator*, on the other hand, 'may have an advisory role on the content of the dispute' and 'give expert advice on likely settlement terms'.<sup>11</sup> In the view of others, mediation and conciliation is substantially the same.<sup>12</sup> According to this view, mediation often includes an evaluation of the case, i.e. 'an assessment of the merits of a case'<sup>13</sup>.

In Australia, mediation is understood as facilitating rather than advisory.<sup>14</sup> However, for the purposes of this paper, it is not necessary to commit oneself to one of these

<sup>6</sup> Ware, above n 5, 265; Boniface, Kumar and Legg, above n 1, [4.220]; Tania Sourdin, *Alternative Dispute Resolution* (3<sup>rd</sup> ed. 2012) [3.05], [3.50].

<sup>7</sup> Ware, above n 5, 265.

<sup>8</sup> Ware, above n 5, 265.

<sup>9</sup> S 25 of the *Civil Procedure Act 2005* (NSW). For other definitions see, for example, Ruth Charlton, *Dispute Resolution Guidebook* (2000) 5; Legg, above n 1, 123 n 3; Sourdin, above n 6, [3.05] ff.

<sup>10</sup> Definition of NADRAC, quoted in Sourdin, above n 6, [3.10], and Boniface, Kumar and Legg, above n 1, [4.180]; Charlton, above n 9, 5.

<sup>11</sup> Australian Standard AS 4608-2004: Dispute Management Systems, quoted in Sourdin, above n 6, [6.15]; see also Sourdin, above n 6, [3.10]; Karl Mackie et al, *The ADR Practice Guide, Commercial Dispute Resolution* (3<sup>rd</sup> ed. 2007) 12; Carroll, above n 4, 194.

<sup>12</sup> See the references in Sourdin, above n 6, [6.10].

<sup>13</sup> Ware, above n 5, 265 f. and 290; Legg, above n 1, 123; Mackie et al, above n 11, 45 (highlighting, however, that '[i]n reality, there are endless shades of grey' and criticising this distinction as 'often too simplistic'); John S Murray, Alan Scott Rau and Edward F Sherman, *Mediation and Other Non-Binding ADR Processes* (1996) 142.

<sup>14</sup> Sourdin, above n 6, [3.35].

definitions. I will use the term mediation *in the wider sense*, and refer to the distinction when helpful.

## 2.2. Recent Developments towards Compulsory Mediation

Recent developments in Australia require the parties *to consider* some forms of ADR, including mediation. An important means to promote mediation are *pre-action protocols*. A pre-action protocol sets out 'a series of steps or requirements that a potential litigant is required to undertake in an effort to resolve a dispute without recourse to the courts and as a prerequisite to litigation'<sup>15</sup>. Such steps may include correspondence between the prospective litigants, the exchange of information and ADR methods.<sup>16</sup>

In the Commonwealth, the *Civil Dispute Resolution Act 2011* (Cth) ('CDRA') requires the prospective parties to make 'genuine steps'<sup>17</sup> in order to settle the dispute (and to avert court proceedings) before commencement of litigation. These provisions apply to proceedings before the Federal Court of Australia and the Federal Magistrates Court, unless there is an exception under CDRA Part 4.<sup>18</sup>

In CDRA s 4, the legislature sets out which steps it deems to be 'genuine'. One example is to consider 'whether the dispute could be resolved by a process facilitated by another person, including an alternative dispute resolution process', and, if the parties agree to such a process, to agree 'on a particular person to facilitate the process [and to attend] the process'. The process mentioned in these provisions obviously includes mediation. Other examples of genuine steps suggested in CDRA s 4 are 'notifying the other person of the issues [...] that are in dispute' in order to discuss them, 'responding appropriately to any such notification', an exchange of information and documents and negotiations in order to resolve the dispute.<sup>19</sup> Thus, the CDRA obviously contains typical provisions of pre-action protocols, although this term is not mentioned in the CDRA.

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<sup>15</sup> Michael Legg and Dorne Boniface, 'Pre-action protocols in Australia' (2010) 20 *Journal of Judicial Administration* 39.

<sup>16</sup> Legg, above n 1, 136.

<sup>17</sup> CDRA s 3. See also Sourdin, above n 6, [8.50] and [11.10].

<sup>18</sup> CDRA s 5.

<sup>19</sup> See CDRA s 4(1). Since this paper deals specifically with *mediation*, I will not go into further detail.

Counsels to the parties have to assist the parties in fulfilling their duties under the act.<sup>20</sup>

Although the *CDRA* does not force unwilling parties to use mediation, the parties have to explain which 'genuine steps' they have taken to avoid litigation in a 'genuine steps statement'.<sup>21</sup> If no such steps were taken, the statement has to specify the reasons why. Furthermore, the court may take into consideration 'whether [a party] took genuine steps to resolve the dispute' when making decisions in the proceedings.<sup>22</sup> According to *CDRA* s 12, such steps may also be taken into consideration when the court exercises a discretion to award costs.

Of particular interest are the powers given to the court by *CDRA* ss 12(2) and 12(3): the court may order a lawyer to bear costs in case of non-compliance with *CDRA* s 9.

In summary, although parties are not forced to use mediation before commencing litigation,<sup>23</sup> they have strong incentives to fairly consider mediation due to the genuine steps statement and the risk of adverse cost orders.

NSW recently introduced Part 2A into the *Civil Procedure Act 2005* (NSW) ('*CPA*').<sup>24</sup> *CPA* s 18C allows to set out pre-litigation protocols for specified classes of civil disputes. These protocols may provide for (*inter alia*) 'appropriate negotiation and alternative dispute resolution options', including mediation<sup>25</sup>. Under *CPA* s 18D, any party has to comply with the pre-litigation requirements set out in *CPA* s 18E. These pre-litigation requirements include 'considering, and where appropriate proposing, options for resolving the dispute without the need for civil proceedings in a court, including [...] resolution through [...] alternative dispute resolution processes', which includes mediation. However, after concerns have arisen with respect to the

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<sup>20</sup> *CDRA* s 9.

<sup>21</sup> *CDRA* s 6.

<sup>22</sup> *CDRA* s 11.

<sup>23</sup> Sourdin, above n 6, [11.15].

<sup>24</sup> See Boniface, Kumar and Legg, above n 1, [2.380] ff.; Sourdin, above n 6, [8.15].

<sup>25</sup> *CPA* s 18A(1).

requirements set out in *CPA Part 2A*, this Part is deferred at the moment. NSW intends to rely on the experience gained under the *CDRA*.<sup>26</sup>

Similar provisions were enacted in other states.<sup>27</sup>

Moreover, mandatory pre-litigation dispute resolution obligations exist in particular fields of law, such as family law, native title law, farm debt law and retail tenancy law, in disputes between legal practitioners and clients, health care disputes etc.<sup>28</sup> The relevant acts usually require the parties to attend 'some form of ADR sessions as a pre-condition to litigation'<sup>29</sup>.

For completeness' sake it should be noted that courts often have the power to refer pending proceedings to mediation at any time and without the parties' consent.<sup>30</sup> Since this paper deals with *pre-litigation* mediation, it will not focus on these powers.

In summary:

- Various provisions give the courts the power to refer *pending proceedings* to mediation even without the consent of the parties.
- *Prior to the commencement* of court proceedings, mediation is, in general, not compulsory in Australia. Mandatory attendance to ADR / mediation seems to be limited to disputes in (relatively) narrow fields of law.
- Recent legislation gives the parties strong incentives *to consider mediation* before commencing litigation.

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<sup>26</sup> Boniface, Kumar and Legg, above n 1, [2.380] and [2.420]; Sourdin, above n 6, [11.10].

<sup>27</sup> See Sourdin, above n 6, [8.30] ff. and [11.10]; Legg, above n 1, 138; for WA see Carroll, above n 4, 172 n 35.

<sup>28</sup> See, for an overview and examples, Sourdin, above n 6, [11.15] and [13.90]; the Hon JJ AC Spigelman, 'Mediation and the Court' (2001) #77 May/June 2001 *Australian Construction Law Newsletter* 5, 7.

<sup>29</sup> Sourdin, above n 6, [11.15].

<sup>30</sup> See, for example, s 53A of the *Federal Court of Australia Act 1975* (Cth); *CPA* ss 25 ff.; Boniface, Kumar and Legg, above n 1, [4.270]; Legg, above n 1, 192 ff.; Sourdin, above n 6, [8.20] and [8.125]; Victorian Law Reform Commission, *Civil Justice Review, Report* (2008) 248 ff. and 257. Jane Hider, 'Compulsory Mediation' #62 *Australian Construction Law Newsletter* 11, 12, highlights that some courts refer *any* case to mediation first, what may have similar effects as a statutory prerequisite.

### 3. Pre-action Requirements in Switzerland

#### 3.1. Pre-action Requirement of Conciliation and Exceptions

In Switzerland, a prospective plaintiff usually needs an 'authorisation to proceed' (*Klagebewilligung*) before he can file his claim with the court. This authorisation to proceed is granted by a 'conciliation authority' (*Schlichtungsbehörde*), where the parties have to undertake an attempt to conciliate the dispute.<sup>31</sup> The conciliation authorities are permanent bodies provided by the Cantons (= the Swiss states).<sup>32</sup>

However, this general rule is subject to some exceptions:

- No attempt to conciliate the dispute is required in some urgent matters or in family matters.<sup>33</sup>
- No attempt to conciliate the dispute is required in disputes for which a 'Commercial Court' has jurisdiction.<sup>34</sup> Four out of 26 Swiss Cantons have established a Commercial Court for commercial disputes.
- No attempt to conciliate the dispute is required in disputes relating to intellectual property rights, cartel law disputes, disputes on the use of a business name, disputes on collective investment schemes and disputes under the Stock Exchange Act.<sup>35</sup>
- Finally, in financial disputes with an amount in dispute of at least CHF 100,000, the parties may mutually waive any attempt to conciliate the dispute.<sup>36</sup>

One of the main ideas of the new SCPC was to strengthen the need to attempt to conciliate, which was widely supported.<sup>37</sup> The materials of the legislation process

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<sup>31</sup> Art. 197 SCPC.

<sup>32</sup> Art. 3 SCPC.

<sup>33</sup> Art. 198 SCPC.

<sup>34</sup> Art. 198 lit. f SCPC in connection with Art. 6 SCPC.

<sup>35</sup> Art. 198 lit. f SCPC in connection with Art. 5 SCPC.

<sup>36</sup> Art. 199 SCPC.

<sup>37</sup> See Explanatory Memorandum of the Swiss Federal Council regarding the Draft for the Swiss Civil Procedure Code, Official Federal Gazette 2006 (*Botschaft des Bundesrates vom 28. Juni 2006; BBl 2006 7221*) 7221, 7327; Results of the Consultation about the Preliminary Draft of a Federal Act about the Swiss Civil Procedure Code (CPC), released in 2004 (*Zusammenstellung der Vernehmlassungen Vorentwurf für ein Bundesgesetz über die Schweizerische Zivilprozessordnung (ZPO) 2004*) 461 ff.

show that the provisions requiring an attempt to conciliate were tightened: Whereas the preliminary draft suggested that the parties may waive the need to attempt to conciliate unanimously, the SCPC now in force allows a waiver only where the amount in dispute exceeds CHF 100,000, and the plaintiff's right to waive the need to attempt to conciliate unilaterally at his discretion virtually disappeared.<sup>38</sup>

On request of all involved parties, the conciliation proceedings before the state-provided conciliation bodies may be replaced by private-run mediation.<sup>39</sup> If the parties agree to use private mediation, they are responsible for funding, organising and conducting the mediation themselves.<sup>40</sup> If no agreement is reached in private mediation, the conciliation authority grants the authorisation to proceed.<sup>41</sup> If an agreement is reached, the parties may jointly request that the agreement reached through mediation shall be given the same effect as a legally binding decision.<sup>42</sup>

Figures for the Canton of Zurich show, however, that parties virtually never agreed to use private-run mediation. In 2011, private mediation replaced the state-provided conciliation proceedings in 2 out of 8,544 cases only.<sup>43</sup>

### 3.2. Conciliation Authorities

In the Canton of Zurich, the conciliation authority is an impartial officer elected by the citizens. In smaller villages, this officer may be a layperson, whereas in larger municipalities a full-time professional with a law degree is in charge. In disputes relating to tenancy and lease of property, the conciliation authority is a panel

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<sup>38</sup> See Art. 191 f. of the Preliminary Draft of the Expert Commission for the Swiss Civil Procedure Code, released in June 2003 (*Schweizerische Zivilprozessordnung ZPO, Vorentwurf der Expertenkommission, Juni 2003*) and Art. 196 of the Draft for the Swiss Civil Procedure Code, Official Federal Gazette 2006 (*Entwurf für die Schweizerische Zivilprozessordnung, BBl 2006, 7413*); see for the reasons Results of the Consultation, above n 37, 461 ff. and Explanatory Memorandum, above n 37, 7329.

<sup>39</sup> Art. 213 ff. SCPC.

<sup>40</sup> Art. 216 and Art. 218 SCPC.

<sup>41</sup> Art. 213 SCPC.

<sup>42</sup> Art. 217 SCPC.

<sup>43</sup> Report of the Upper Court of the Canton of Zurich 2011 (*Rechenschaftsbericht des Obergerichts des Kantons Zürich über das Jahr 2011*) 82. It will be interesting to see whether this number will increase in future.

consisting of three experts: one impartial, legally trained chairperson accompanied by two impartial tenancy expert representatives, acting part-time, each representing the federation of landlords and of tenants, respectively.<sup>44</sup>

Since the conciliation authorities are provided by the Cantons, the names of the authorities vary. In the Canton of Zurich, the conciliation authorities are known as 'justices of the peace' (*Friedensrichter*) or as 'conciliation authority in tenancy matters' (*Schlichtungsbehörde in Mietsachen*). In other Cantons, they are known as 'mediation authority' (*Vermittleramt*).

### 3.3. Proceedings before the Conciliation Authority

The plaintiff initiates the conciliation proceedings by an application. The application has to include the prayers for relief and a description of the contentious issues.<sup>45</sup> The application is often filed with annexures, such as previous correspondence between the parties, copies of the relevant agreements etc.

The conciliation authority summons the parties to a hearing which must take place within two months.<sup>46</sup> At the hearing, the conciliation authority attempts to reconcile the parties in an informal manner. If it helps to resolve the dispute, the settlement may also include contentious issues which are not part of the proceedings. In tenancy disputes, the conciliation authority also provides legal advice to the parties.<sup>47</sup>

The conciliation authority considers the filed documents and may conduct an inspection. If the parties agree, the conciliation authority may hold additional hearings.<sup>48</sup> Generally, the parties must appear in person at the hearing, but they may be accompanied by a lawyer.<sup>49</sup> The hearing is not public. The statements of the parties are not recorded and must not be used in subsequent court proceedings.<sup>50</sup>

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<sup>44</sup> Art. 200 SCPC.

<sup>45</sup> Art. 202 SCPC.

<sup>46</sup> Art. 203 SCPC.

<sup>47</sup> Art. 201 SCPC.

<sup>48</sup> Art. 203 SCPC.

<sup>49</sup> Art. 204 SCPC.

<sup>50</sup> Art. 205 SCPC.

Unless the parties agree otherwise, the fees of the conciliation authority are charged to the plaintiff. However, the costs for the parties are not expensive<sup>51</sup>, and if an action is filed, these costs become part of the action (thus, the plaintiff will recover its costs in successful cases).<sup>52</sup>

A settlement at the conciliation hearing has the effect of a binding court decision.<sup>53</sup> If the parties fail to settle, or if the defendant does not attend the hearing<sup>54</sup>, an authorisation to proceed is granted. The plaintiff is entitled to file the action with the court within 30 days or three months after the authorisation to proceed has been granted.<sup>55</sup>

In practice, the resources of the conciliation authorities are limited to a few hours per case. On the other hand, the *efforts* to be made and the *costs* to be borne by the parties are limited as well.

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<sup>51</sup> In the Canton of Zurich, the fees of the conciliation authority do not exceed CHF 1,240, even if the amount in dispute is higher than CHF 100,000 (see § 3 para. 1 of the Ordinance regarding Fees of the Upper Court of the Canton of Zurich [*Gebührenverordnung des Obergerichts*, GebV OG], LS 211.11). The parties have to bear their own lawyers' fees. In particular fields of law, for example in tenancy matters, the parties do not have to pay any costs apart from their own lawyers' fees.

<sup>52</sup> Art. 207 SCPC.

<sup>53</sup> Art. 208 SCPC.

<sup>54</sup> The parties are legally obliged to attend the hearing unless there is a good cause (see Art. 204 SCPC for details). If the plaintiff is in default, it is assumed that he withdraws his application for conciliation (Art. 206 para. 1 SCPC); thus, he can not file his claim with the court. If the defendant is in default, the proceedings are continued as if no agreement had been achieved (Art. 206 para. 2 SCPC), and there is no punitive sanction. However, defendants attend the hearing in many cases, be it because they are genuinely interested in a settlement, be it that they do not want to give the impression that the plaintiff's claim is justified or that they are unwilling to settle.

<sup>55</sup> Art. 209 SCPC.

### 3.4. Settlement Rate

According to the reports provided by the Cantons<sup>56</sup>, the conciliation authorities are quite successful:

- In the Canton of Zurich, in the year 2011, the conciliation authorities granted in 3,122 out of 8,544 cases authorisations to proceed. In other words: 5,422 disputes (63%) were resolved at this early stage.<sup>57</sup>
- In the Canton of Zug, the conciliation authorities granted authorisation to proceed in 472 out of 913 cases.<sup>58</sup> The other 442 cases (48.41%) were terminated at this stage.<sup>59</sup> The conciliation authority in employment matters dealt with 301 proceedings; 159 proceedings (52.82%) were terminated at this stage.<sup>60</sup>
- In the Canton of Schwyz, the conciliation authorities granted authorisation to proceed in 423 out of 1033 cases (41%). Thus, 59% of the proceedings were terminated at this stage.<sup>61</sup> The settlement rate before the conciliation authority in tenancy matters was 73% in 2010 and 70% in 2009.

In addition, a plaintiff obtaining an authorisation to proceed from the conciliation authority may decide not to file his claim with the court at the time. Figures from the Canton of Schwyz show that only 70% of the plaintiffs obtaining an authorisation to

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<sup>56</sup> The author selected the court reports of the Cantons of Zurich and Zug because both Cantons are important business centres. Furthermore, the Canton of Zurich provides the most detailed data and the author practised in this Canton. Since the settlement rate might be affected by the structure of the population, the author also assessed figures of the rural Canton of Schwyz. The author assumes that figures of other Cantons show similar settlement rates.

<sup>57</sup> Report of the Upper Court of the Canton of Zurich 2011, above n 43, 13 and 66. This data must be interpreted carefully, since the Canton of Zurich established a Commercial Court and commercial disputes are not subject to compulsory conciliation proceedings.

<sup>58</sup> Data for 2010; only a few court reports for 2011 are available yet. Since the provisions for conciliation proceedings did not change fundamentally, data from 2010 is in my opinion also reliable.

<sup>59</sup> Report of the Upper Court of the Canton of Zug (*Obergericht des Kantons Zug, Rechenschaftsbericht 2010, ROG 2010*) 25.

<sup>60</sup> Report of the Upper Court of the Canton of Zug, above n 59, 26.

<sup>61</sup> Data for 2010; see Report 2010 of the Cantonal Court and of the Administrative Court of the Canton of Schwyz (*Kantonsgericht/Verwaltungsgericht, Rechenschaftsberichte 2010*) 13.

proceed continue to enforce their claims.<sup>62</sup> This rate may be representative for other Cantons as well.

### 3.5. Conclusions

After this short description, the following conclusions can be drawn:

1. In Australia, mandatory pre-litigation mediation seems to be limited to (relatively) narrow fields of law. In Switzerland, the attempt to settle the dispute amicably is in general mandatory<sup>63</sup>, subject to some important exceptions.
2. Prospective litigants can choose to conciliate either before state-run 'conciliation authorities' or (with the defendants consent) in private-run mediation proceedings.
3. In the light of the definition of mediation, the plaintiff's obligation to obtain an 'authorisation to proceed' before commencement of court proceedings contains strong elements of compulsory pre-litigation mediation. The proceedings before the Swiss conciliation authorities and the steps typically included in mediation are the same.<sup>64</sup>
4. Since the conciliation authorities in tenancy matters typically evaluate the legal positions and make settlement proposals, such proceedings are clearly *evaluative* mediation. The ordinary conciliation authorities usually take a less active role, in particular when a layman is in charge. Thus, such proceedings are more similar to *facilitative* mediation.
5. Whereas in Australia 'it is presumed that would-be litigants will make their own arrangements'<sup>65</sup> to undertake required mediation steps (if any), the Swiss conciliation authorities are state-run authorities. The parties to a dispute are not entitled to choose the conciliation authority unless they agree on private-run mediation.

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<sup>62</sup> Report 2010 of the Cantonal Court and of the Administrative Court of the Canton of Schwyz, above n 61, 13.

<sup>63</sup> Explanatory Memorandum, above n 37, 7328.

<sup>64</sup> With the exception that private sessions are not held; see, for example, Sourdin, above n 6, [3.40]; Boniface, Kumar and Legg, above n 1, [4.220].

<sup>65</sup> Sourdin, above n 6, [11.15].

6. Although the attempt to conciliate is – in general – compulsory, the situation is different in cases which we would typically describe as 'complex commercial litigation': Where the amount at stake exceeds CHF 100,000, the parties may mutually waive the conciliation requirement. Furthermore, in important fields of commercial law, such as IP law or cartel law, there is no requirement to conciliate at all.
7. The Swiss conciliation authorities are not designed for complex commercial cases. Although the mediation body may have special expertise in the field of the dispute (i.e. tenancy law), the resources of the conciliation bodies are not appropriate to deal with large, complex cases.

## 4. Factors of Success for Mediation

Various factors seem to be important for the prospects of success:

### 4.1. Willingness of the Parties

The parties' willingness to settle the dispute (or at least to negotiate in good faith towards a settlement) is maybe the most important factor of successful mediation.<sup>66</sup> Thus, it has been argued that mandatory mediation is a 'contradiction in terms'<sup>67</sup>.

There are various reasons why parties might be unwilling to settle:

- a party intends to obtain a legal precedent;<sup>68</sup>
- the parties wish to gather further evidence and/or examine witnesses;<sup>69</sup>
- a party aims at achieving another goal<sup>70</sup> (for example increasing the opponents costs, or delaying<sup>71</sup> the court proceedings);

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<sup>66</sup> Mackie et al, above n 11, 202; Hider, above n 30, 12.

<sup>67</sup> See the Hon Spigelman, above n 28, 7; Altobelli, above n 2, 43, highlighting that only *attendance* in mediation is compulsory and not *settlement*.

<sup>68</sup> Ware, above n 5, 158, 311; Mackie et al, above n 11, 48, 200; Altobelli, above n 2, 43.

<sup>69</sup> Mackie et al, above n 11, 48; Hider, above n 30, 16.

<sup>70</sup> Altobelli, above n 2, 43.

<sup>71</sup> Altobelli, above n 2, 43; Hider, above n 30, 13.

- the parties are seeking to be known as 'fierce litigators in order to intimidate future adversaries';<sup>72</sup>
- settlement is no option as a matter of a party's policy;<sup>73</sup>
- a party is looking for the publicity gained by litigation or by a favourable verdict.<sup>74</sup>

Although it can be discussed whether a party unwilling to settle would comply with her duties to attend a mediation and to negotiate in good faith, mediation proceedings have little prospect of success under the above circumstances.<sup>75</sup>

## 4.2. Amount in Dispute?

An analysis of data from the Canton of Zurich indicates that the settlement rate dramatically falls with an increasing amount at stake<sup>76</sup>:

Amount in dispute/ outcome	5k-30k	30k-100k	>100k
Settlement	30.65%	20.66%	10.81%
Authorisation to proceed granted	48.19%	58.29%	68.65%

However, this data must be interpreted within the context of the nature of the Swiss conciliation bodies: they are not designed to deal with large, complex cases. A better interpretation of the figures is that parties weigh up the amount at stake against the costs (time, legal fees) of further court proceedings. In small cases, where the costs do not justify further steps before court, a settlement is more likely to occur. But even

<sup>72</sup> Ware, above n 5, 311; see also Mackie et al, above n 11, 200.

<sup>73</sup> Mackie et al, above n 11, 200.

<sup>74</sup> Ware, above n 5, 311; Mackie et al, above n 11, 200.

<sup>75</sup> For the argument that even unwilling parties may settle in court-ordered mediation see also below 5.1.

<sup>76</sup> My own analysis; source: Report of the Upper Court of the Canton of Zurich 2011, above n 43, 82. Only around 80% of all proceedings result in either an authorisation to proceed or a settlement. The remaining 20% of the proceedings are terminated by withdrawal of the claim by the plaintiff (*Rückzug*; 10-14%) or by acknowledgement of the claim by the defendant (*Klageanerkennung*; 1-5%).

in large, complex cases, mediation has great prospects of success, provided that the mediation process is appropriate. There are various examples of successful mediation in high stakes cases.<sup>77</sup>

### 4.3. The Parties' Ability to Value the Case

Ware pointed out:

*Settlement is the sale of a claim by Plaintiff to Defendant. Sales occur when both buyer and seller [i.e. plaintiff and defendant] believe that their interests are better served by the sale [i.e. settlement] than [...] by litigating further. [...] in deciding whether to make or accept an offer, the party tries to foresee the results of further litigation. To make an informed decision, the parties need realistic expectations about the results of further litigation.*<sup>78</sup>

Other sources refer to the 'ripe time' for mediation – meaning the optimum point in time at which a settlement is likely to occur, and, thus, mediation is typically successful.<sup>79</sup> The parties can not be expected to settle without sufficient knowledge about the strengths and weaknesses of their respective cases.<sup>80</sup> Studies show (not surprisingly) that 'the later a case is referred to mediation the greater the chance of settlement'<sup>81</sup>.

In the end, both approaches deal with the same issue. Mediation is likely to be successful if the parties are able to value their case. Yet, a reasonable valuation of the case is impossible unless the parties are able to assess the factual and legal situation with a sufficient level of certainty. How could parties make an 'informed decision' before they know the other party's case? Sometimes, the ability to value the case arises not before court proceedings have commenced. Other factors which may encourage decision makers to settle a dispute, such as increasing legal costs, occur only after litigation has started.<sup>82</sup>

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<sup>77</sup> See Sourdin, above n 6, [13.65]; Legg, above n 1, 127; Mackie et al, above n 11, 198 f.

<sup>78</sup> Ware, above n 5, 157 f.

<sup>79</sup> See, for instance, Legg, above n 1, 139 ff.; Sourdin, above n 6, [13.80]; *Oasis Fund Management Ltd v ABN Amro Bank NV* [2009] NSWSC 967 [2-11] (per McDougall J).

<sup>80</sup> VLRC, above n 30, 275; Bergin CJ, quoted in Legg, above n 1, 140.

<sup>81</sup> Legg, above n 1, 140.

<sup>82</sup> Sourdin, above n 6, [13.80].

#### 4.4. Where Neutral Evaluation can be Provided

Parties are sometimes unable to settle because they are too optimistic about the outcome of their case at litigation.<sup>83</sup> A mediator providing the parties with a neutral evaluation of the case can bring such expectations to more realistic views. If the parties change their expectations about the success of litigation, they may suddenly find themselves in a 'settlement zone'.<sup>84</sup>

(Since *facilitative* mediation can also be successful, neutral evaluation is not a *conditio sine qua non*. In Switzerland, however, the conciliation authorities in tenancy matters [and judges] usually provide the parties with an evaluation of the case during settlement talks.)

The evaluator must be an expert, because only persons who are (in the parties' view) suitable to evaluate the possible outcome of litigation are reliable.<sup>85</sup> Swiss data confirms that the settlement rate increases where the mediation body has expert knowledge in the field of the dispute: the settlement rate before the conciliation authority in tenancy matters in the Canton of Schwyz was 73%, whereas 'only' 59% of the proceedings within the competence of the ordinary conciliation authorities were terminated at this stage.<sup>86</sup>

In this context it is interesting to learn that the Swiss legislator excluded proceedings in particular fields of law (such as cartel law, IP etc.) from the need to conciliate *because the conciliation authorities were lacking the specialised knowledge* of the subject in these fields of law.<sup>87</sup> The same doubts were raised for disputes within the competence of a Commercial Court. However, the granting of an exception for disputes within the competence of a Commercial Court was contentious and this

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<sup>83</sup> Ware, above n 5, 291.

<sup>84</sup> Ware, above n 5, 291; VLRC, above n 30, 253.

<sup>85</sup> Ware, above n 5, 292.

<sup>86</sup> Data for 2010; see Report 2010 of the Cantonal Court and of the Administrative Court of the Canton of Schwyz, above n 61, 13.

<sup>87</sup> Explanatory Memorandum, above n 37, 7329.

exception was introduced in the parliamentary debates *against* the proposal of the government and the recommendation of the parliamentary commission.<sup>88</sup>

## 5. Conclusions

Complexity in litigation can be caused by various factors<sup>89</sup>, e.g. legal complexity, factual complexity, high stakes, multiple parties and lawyer's conduct. No one hinders successful mediation *a priori*. On the contrary, mediation can be successful in cases with high stakes as well as in cases with multiple parties.<sup>90</sup> In cases with legal complexity, mediation might be even more successful because the parties may focus *on interests* rather than *on legal positions* and enforceable rights.<sup>91</sup>

In my opinion, the two main factors which are crucial to the prospects of success for mediation are the parties' willingness to settle and the parties' ability to value the case.

### 5.1. Conclusions from the Requirement of the Parties' Willingness to Settle

As set out above, there are various reasons why a party might be unwilling to settle, and, thus, a requirement to use mediation before court proceedings commence would be pointless, a waste of money and cause unnecessary delay.<sup>92</sup> The problem, however, is, to properly identify these cases. Whereas unwilling parties with justifiable reasons can be expected to state that they are, for example, seeking a precedent, a party *intending to delay* the court proceedings will never publicly admit so. Instead, such party would agree on mediation and, after raising issue after issue, not settle. Hider highlights the disadvantages for plaintiffs in cases where the court

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<sup>88</sup> See Official Bulletin of the Debates of the Swiss Parliament, House of the States, AB 2007 S 519, and the speeches of Justice Minister Eveline Widmer-Schlupf and of MP Anita Thanei, Official Bulletin of the Debates of the Swiss Parliament, House of Representatives, AB 2008 N 949, 950 f.

<sup>89</sup> Legg, above n 1, 18 ff.

<sup>90</sup> See Legg, above n 1, 127 ff.; critically Hider, above n 30, 15.

<sup>91</sup> See, for example, Legg, above n 1, 132.

<sup>92</sup> See Hider, above n 30, 13.

orders mediation, giving the defendant another means for delaying the court proceedings.<sup>93</sup> In such cases, the plaintiff needs protection.

On the other hand, figures show that court-ordered mediation is often successful even though the parties did not agree on mediation.<sup>94</sup> Whereas parties sometimes hesitate to show their willingness to use mediation because they fear that their behaviour could be construed as weakness,<sup>95</sup> this argument is cynical where economic reasons force the weaker party to agree on unfavourable settlement terms. Unsuccessful compulsory mediation increases the costs of the parties and causes further delay which can, as a result, make access to justice more difficult.<sup>96</sup>

On the other hand, if the parties are willing to negotiate in good faith, they are free to agree on mediation before litigation. In fact, parties to commercial contracts often agree upon certain dispute resolution mechanisms when they enter into a contract<sup>97</sup>, i.e. *before a dispute has arisen*. Such provisions may involve direct settlement talks between senior management, mediation<sup>98</sup> or arbitration. Parties may also agree on ADR *after a dispute has arisen*.

Since commercial parties usually have legal advisors (in-house and/or external legal counsels), they are aware of the alternatives to court proceedings. The involvement of lawyers has further advantages:

- First, the lawyer's job includes to assess the client's interests and to recommend the best way to pursue these interests.<sup>99</sup> If it is in the interest of the client to get a precedent, the lawyer will recommend to litigate; if the client's interest is to avoid negative publicity, the lawyer is likely to recommend an early settlement, and if the costs exceed the benefits, the lawyer should recommend to write off an alleged claim.

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<sup>93</sup> Hider, above n 30, passim; see also VLRC, above n 30, 262.

<sup>94</sup> See the Hon Spigelman, above n 28, 7 f.

<sup>95</sup> See the Hon Spigelman, above n 28, 7 f.

<sup>96</sup> Ware, above n 5, 334.

<sup>97</sup> See Hider, above n 30, 11.

<sup>98</sup> See the Hon Spigelman, above n 28, 7.

<sup>99</sup> Murray, Rau and Sherman, above n 13, 2 and 147.

- Second, if settlement is an option (see above), lawyers can negotiate issues unemotionally.<sup>100</sup> It is common sense that lawyers (and their clients) try to reach a settlement before commencing litigation. A reasonable, commercial client is aware of the costs of litigation and is, thus, strongly interested in a settlement rather than litigation. This was one of the reasons why the Swiss parliament eased the requirement to conciliate in commercial disputes.<sup>101</sup>

In summary: If commercial parties are willing to resolve an issue by mediation, they are free to do so and will do so – thus, a pre-litigation requirement to undertake mediation is *not necessary*.

## 5.2. Conclusions from the Requirement of the Parties' Ability to Value the Case

Parties without legal advisors are often unwilling to settle the dispute unless they get informed about their legal position. In my experience as chairman of a Swiss conciliation authority in tenancy matters, parties often felt comfortable to enter into a settlement agreement after they were provided with impartial legal expert advice. Other parties might be unable to discuss the issues in dispute in a focused and civilized manner. In such cases compulsory mediation could be useful simply to facilitate negotiations between the parties.

However, the starting point in complex commercial litigation is different because the parties are usually represented by lawyers.

Lawyers are able to assess the strengths and weaknesses of a case<sup>102</sup>, *provided that* they have sufficient knowledge about the other party's arguments, the factual background and the available evidence. But at which point in time do the lawyers have sufficient knowledge about the other party's case? There is no general answer. Sometimes the facts are known from the beginning, whereas in other cases the facts, strengths and weaknesses do not emerge unless court proceedings have started. Thus, the ripe time for mediation differs, and an inflexible obligation to undertake mediation before court proceedings is not appropriate.

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<sup>100</sup> New South Wales Law Reform Commission, *Community Justice Centres*, Report 106 [2005] NSWLRC 106, [5.78].

<sup>101</sup> See MP Daniel Vischer and Justice Minister Eveline Widmer-Schlumpf in the Official Bulletin of the Debates of the Swiss Parliament, House of Representatives, AB 2008 N 949 ff.

<sup>102</sup> NSWLRC, above n 100, [5.77].

(To deal with this issue, mediation is sometimes conducted in the form of a mini trial with counsels and experts.<sup>103</sup> However, if there is no settlement, the parties have to bear the costs of the unsuccessful mediation *in addition* to the ordinary court's costs.<sup>104</sup> Therefore, if evidence is necessary, it is, in my opinion, more efficiently to find the facts in ordinary court proceedings and to start mediation when the time is ripe.<sup>105</sup>)

There are fears that the conduct of lawyers might itself contribute to complexity.<sup>106</sup> Although the fee arrangements may cause adverse incentives,<sup>107</sup> *commercial* clients are in my experience able to assess the lawyer's conduct. They usually employ in-house counsels, or can obtain a second opinion. There is a market for legal services. Commercial clients are *repeat players* and do not accept excessive legal fees for litigation where an early settlement was in fact reachable. Although lawyers may favour litigation,<sup>108</sup> commercial clients are typically aware of the alternatives to litigation. In my opinion, there is only a small risk that the involvement of lawyers effectively hinders an early settlement of a dispute.

### 5.3. Objectives behind the Idea of Compulsory Mediation

Furthermore, it is worthwhile to investigate the reasons why the idea of compulsory mediation before commencement of litigation is promoted. An important driver of the idea is the attempt to make a 'more effective use of the court resources'<sup>109</sup> or to take some of the case load off the courts<sup>110</sup>, or to clear the court's docket.<sup>111</sup> According to government representatives, litigation should be the 'last resort'<sup>112</sup>.

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<sup>103</sup> See Hider, above n 30, 17; further Legg, above n 1, 129.

<sup>104</sup> The Hon Spigelman, above n 28, 8.

<sup>105</sup> Legg, above n 1, 144, also highlights that parties may 'fail to focus on the real issues' where preparations are not overseen by a judge.

<sup>106</sup> See Legg, above n 1, 20.

<sup>107</sup> Ware, above n 5, 170 f.; Murray, Rau and Sherman, above n 13, 49.

<sup>108</sup> Murray, Rau and Sherman, above n 13, 12.

<sup>109</sup> Carroll, above n 4, 169; see also the references in Sourdin, above n 6, [11.15].

<sup>110</sup> Del-Villar, above n 2, 35.

<sup>111</sup> Ware, above n 5, 270, 332.

<sup>112</sup> Attorney-General of Vic, quoted in Sourdin, above n 6, [11.15].

Court resources are, of course, limited. However, one has to bear in mind that plaintiffs are not free to choose how they enforce their rights because only 'litigation produces legally-binding results [...] even on parties who never agreed to have their disputes resolved in litigation'<sup>113</sup>. In other words: if a defendant is unwilling to settle, the plaintiff *must* enforce his rights by litigation. Consequently, the state has to provide efficient structures which allow the parties to obtain a decision within an appropriate frame of time.

To ease the problem of limited court resources, it would be more transparent to increase the costs for the defeated party in order to obtain sufficient funds to hire more judges and judicial staff rather than installing another hurdle before the parties can go to trial. If the defeated party had to bear the full costs of litigation (including the adversary's expenses), the parties had a stronger incentive to consider voluntary mediation before litigation. Another approach might be to adopt measures in order to simplify, tighten and accelerate the ordinary court proceedings. Faster and cheaper court proceedings would better protect a party from abusive tactics by the adverse party. However, effective measures would in my opinion heavily alter the common law adversarial system, and, moreover, civil law ('inquisitorial') procedures are not known to be always faster.

#### **5.4. Mediation is not Appropriate in Every Case**

Besides the question whether compulsory pre-litigation mediation has great prospects of success, there is another issue: One must not forget the widely accepted fact that *mediation is not appropriate in every case*.<sup>114</sup> Where mediation is used without regard to the circumstances of the case at hand, it can prevent a party from enforcing its claims and, thus, result in a barrier to justice.<sup>115</sup>

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<sup>113</sup> Ware, above n 5, 5 f.

<sup>114</sup> See e.g. VLRC, above n 30, 262 ff.; Hider, above n 30, 17; NSWLRC, above n 100, ch. 4 (in this context, an imbalance of power between the parties and the lack of good faith are of particular interest, see 4.23 f.); Mackie et al, above n 11, 199 ff.

<sup>115</sup> See Mackie et al, above n 11, 170 ff., with reference to the precedents of the European Court of Appeal with respect to Art. 6 of the European Convention on Human Rights; similar issues are discussed in VLRC, above n 30, 262 ff.

Therefore, cases must be 'screened' before referral to mediation to identify possible factors which make mediation not desirable.<sup>116</sup> Mediation as a prerequisite of litigation or an automatic referral of cases to mediation is problematic under this point of view.

## 5.5. Final Remarks

In light of the above, compulsory pre-litigation mediation in complex commercial cases has only limited prospects of success.

In commercial disputes, parties are usually represented by lawyers. One can expect that they try to settle the dispute using all reasonable means before commencement of court proceedings. Where no settlement could be reached, the state has to provide access to justice. The parties' obligations *to consider* mediation, introduced by the CDRA, may ensure that lawyers and parties seriously discuss alternatives to litigation.

Credible mediation in complex commercial cases needs serious preparation, an experienced mediator (maybe an expert), is time consuming – in brief: it costs a lot of time and money and can cause a barrier to justice. Furthermore, mediation is not appropriate in every case. Mandatory mediation can harm the plaintiff's position. Thus, mediation must not be a pre-requisite before commencing litigation.

The mandatory attempt to conciliate in Switzerland is justifiable only because the costs to be borne and the efforts to be made by the parties are limited and the conciliation proceedings can not cause major delay.<sup>117</sup> Therefore, the requirement to obtain an authorisation to proceed is not a hurdle to justice.

The Australian judge's power to refer *pending* proceedings to mediation at any time is a reasonable amendment to encourage settlement talks once the case has become valuable.<sup>118</sup> However, judges must carefully 'screen' the cases when exercising this power, assess whether mediation is appropriate, and order mediation not before the

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<sup>116</sup> See the Hon Spigelman, above n 28, 9; see also Altobelli, above n 2, 44, who emphasizes that there must be an 'adequate screening' before cases are referred to mandatory mediation; Del-Villar, above n 2, 36. However, in Hider's view (Hider, above n 30, 18), courts refer cases too often to mediation including such cases which are not suitable.

<sup>117</sup> See the same argument in VLRC, above n 30, 263.

<sup>118</sup> In Switzerland, on the other hand, the judge himself may initiate settlement talks at any time.

time is ripe. Such a flexible solution fits better the needs in complex commercial cases rather than compulsory pre-litigation mediation regardless the circumstances of the particular case.