



COMMERCIAL MEDIATION IN THE SWISS FINANCIAL SECTOR

A call for reflection at federal level

Since the Financial Services Act (FinSA) came into force on 1st January 2020, 8 commercial mediation bodies (or “offices”) for financial services (or “FinSA Ombudsman Offices”) have joined the Swiss Banking Ombudsman¹ (set up in 1993), the Private Insurance and SUVA Ombudsman (set up in 1972), and the Health Insurance Ombudsman (set up in 1993) in the Swiss financial sector.

Only the 8 ombudsman offices operate on the basis of a legal mandate defined by the FinSA and are recognised by the FDF and the companies affiliated to them. The other ombudsman offices act on the basis of a private mandate from the affiliated companies or their branch organisation and are recognised by their mandators.

However, all these specialised commercial mediation bodies are competent to deal with complaints from dissatisfied clients concerning the companies affiliated to them, after they have tried to find a solution with the latter. When certain conditions are met, these bodies can conduct a mediation procedure between the parties. They have no decision-making powers.

A higher number of mediation bodies can be seen for financial services than for banking services and insurance contracts. However, according to the public activity reports of the various bodies, the rate of complaints regarding banking services and insurance contracts is higher than the rate regarding financial services.

While Switzerland has set up too many ombudsman offices for financial services in relation to the rate of complaints, it is also noticeable that not all branches of the financial sector yet benefit from a specialised commercial mediation body that is competent and accessible at low cost, or even free of charge for dissatisfied clients, and recognised by professionals and the State. This is also not yet the case in all sectors of the Swiss economy. The existing mediation bodies in the Swiss financial sector are therefore not always competent to deal with complaints from dissatisfied clients and it is not always possible to refer clients to another mediation body.

When there is no competent commercial mediation body, it is sometimes sufficient to explain to the client that it would be preferable to try to find a solution with the company concerned before taking any further steps. If this has already been done unsuccessfully, there is still the option of referring the client to a legal adviser of their choice, a consumer protection association, the Federal Consumer Affairs Bureau (FCAB), or a judicial authority.

It is also possible to replace the conciliation procedure with mediation in civil proceedings. However, the request for replacement must be made jointly (art. 213 Code of Civil Procedure, CPC) and the parties must agree on the organisation and funding of the procedure. These conditions can be difficult for the parties in dispute to meet.

“There are more mediation bodies for financial services than for banking services and insurance contracts, despite a higher rate of complaints for the latter”

¹ The Swiss Banking Ombudsman is one of the 8 FinSA mediation bodies and is therefore recognised by the FDF for its activities relating to financial services.

In some cases, the client may choose to report the company to the State Secretariat for Economic Affairs (SECO), the Swiss Commission for Fair Trading, the Competition Commission (COMCO), or a prudential supervisory authority.

If these different options are not convincing, the client is sometimes content to tarnish the company's reputation in the eyes of those around him, the company's partners, or to publish a negative review of the company, seeking to circulate the information as widely as possible. Like legal proceedings, this last option can also damage the reputation of the economic sector concerned as a whole.

It would be preferable to be able to resolve the complaint of a dissatisfied client at the latest before a mediation body, within the framework of a confidential procedure, before taking any other steps, as encouraged by the FinSA.

Given the size of the country and its markets, it should not be necessary to set up several commercial mediation bodies specialising in the same branch of an economic sector - especially if the majority of companies meet client expectations and manage any complaints from their clients appropriately.

When the likelihood of dissatisfied clients and failures in complaints management is low, decentralising complaints to several mediation bodies mainly generates additional costs without ensuring their effectiveness.

It would be preferable for Switzerland to ensure optimal conditions for the proper functioning of the free economy, i.e. free competition between private commercial enterprises and the protection of client trust, in order to facilitate business. It would also be preferable to find genuinely efficient and effective solutions to relieve the judicial authorities, instead of multiplying the number of mediation bodies and increasing the costs for companies, customers or taxpayers without just cause.

Given the development of mediation in Switzerland since the codification of civil procedure at federal level with the entry into force of the Code of Civil Procedure (CCP) in 2008, it is time to recognise that self-regulation of mediation bodies doesn't work any better than self-regulation of conciliation authorities or courts would.

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In order to find the right balance between supply and demand for mediation as well as to guarantee the impartiality and technical skills of the mediation bodies in the Swiss financial sector, the development of commercial mediation in Switzerland needs to be considered at federal level.

Consideration should also be given to improving coordination between specialised mediation bodies and the civil and criminal judicial authorities, to relieve the latter as much as possible.