



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

## **MEDIATING COMMERCIAL DISPUTES: HOT TOPICS AND PRACTICAL TIPS**

**Commission(s) in charge of the Session/Workshop:**

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### **National Report of SWITZERLAND**

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## Mediation Procedure

### 1. What is the typical mediation procedure in your country?

In Switzerland, the typical mediation procedure comprises the following steps:

- a. Collection of information and topics: the mediator informs the parties on the mediation process, clarifies the parties' expectations and the role of the mediator, and eventually, concludes a mediation agreement with the parties;
- b. Identification of interests and needs of all parties involved: relevant facts of the dispute and positions are presented by the parties; together with the mediator, the parties then determine the issues at stake and the order in which these issues will be addressed during the mediation;
- c. Open and creative search for solution options: parties explain their positions to clarify the facts, their (underlying) interests and the legal issues at stake, in order to enable the parties to reach a mutual understanding of their problems and the scope of the conflict;
- d. Evaluation and selection of the different options, negotiation(s): parties and the mediator explore all possible solutions to the issues identified in the second phase, to work on alternative solutions and verify the feasibility of the various options;
- e. Drafting of agreement, feasibility check, signing: drafting and finalising the settlement agreement reached by the parties through the mediation.

### 2. Is mediation popular in your country? Why? Why not?

Swiss state court proceedings (Swiss Civil Procedure Code and before its introduction the various Cantonal codes of procedure) traditionally stipulate for a mandatory conciliation procedure to take place before (most) actions can be brought to court. This means that the parties involved in a dispute must undertake an attempt at conciliation before a state conciliation board before filing their claim to the court. In the past, with a mandatory conciliation procedure that has to take place anyway, it is rather self-explanatory that it was hard for mediation to grow in popularity.

However, with the introduction of the Swiss Civil Procedure Code in 2011, parties were given the opportunity to choose between the state conciliation procedure and (private)

mediation. Parties must jointly apply to the conciliation board for a mediation to take place. With the introduction in the Swiss Civil procedure Code, mediation should become more popular in the years to come.

### **3. How does mediation differ from arbitration/state court proceedings in your country?**

Mediation in Switzerland varies from state court/arbitration proceedings in many ways. The main differences are the following:

- mediation aims at consensus between the parties;
- the purpose of court/arbitration proceedings is the enforcement of claims, the purpose of mediation is satisfaction of the interests/needs of all parties involved;
- in mediation proceedings, it is the parties' own responsibility to solve a conflict/dispute; in court proceedings this responsibility is delegated to a judge;
- in court/arbitration proceedings parties are bound to their prayers/positions; mediation leaves room for creativity and (broad) adjustments of the parties' positions;
- mediation is more efficient and less costly than court/arbitration proceedings as the parties determine length/duration of the mediation.

### **4. In your country, what are the typical disputes where mediation works? When does mediation not work?**

From a Swiss (legal) point of view, mediation is suitable to all conflicts that involve common interests of the parties and/or a certain emotional component. This is often the case when the parties are in a long-term relationship, personally or legally (e.g. marriage and family, common ownership, conflicts between tenants and landlords, building industry, partnership agreements).

On the other hand, there are cases where good reasons militate against mediation:

- creation of a precedent;
- a judgement/arbitral award could be obtained rather quickly and without excessive costs involved;
- (previous) abuse of process by one of the parties involved.

**5. What psychological aspects need to be taken into account in your country like negotiation tactics and cultural aspects?**

It is probably important to note that mediation must aim to determine whether the topics of a dispute are actually the basis of the dispute or whether other (potential) motifs are virulent: recognition, status, respect, expectations, retribution and many more. Without determining what the “actual conflict” is, this conflict remains virulent. In many conflicts the clarification of the legal issues is only superficial. With the the determination of winners and losers, the “actual conflict” will often only intensify. Therefore, in mediation not only provable but also subjective considerations and values are important and relevant.

It is important to enter into a mediation with the awareness that a winner/loser outcome is to be avoided and a prolific agreement should be reached. Mediation aims for the conclusion of an independent agreement between the parties that is made autonomously.

Culturally, in Switzerland, one must be aware that although it is a small country, the differences can be huge, in particular between the German and French part of the Country.

**6. Is there a particular style/approach to mediation in your country? Do mediators tend to approach mediations in a neutral/facilitative way (acting as an intermediary between negotiating parties) or do they adopt an evaluative approach (expressing views/opinions as to merits and/or likely outcomes)?**

The mediator usually applies different techniques, such as active listening, rewording, synthesis and negotiating appropriately to the matter. Mediators in Switzerland tend to concentrate on the common interest of the parties and not on their (individual) positions as the parties’ needs are more easily brought down to a common denominator than their claims. The mediator’s imagination is often quite important. His objective are reasonable solutions that are based on objective criteria.

Whether the mediator adopts an evaluative approach will depend very much on the mediation agreement with the parties. Sometimes it is requested by the parties. However, the mediator’s main task is to actively pursue to present one parties’ views as comprehensive as possible in order to make the other party understand its opposition.

## Mediator

### 7. How is the mediator chosen/appointed in your country? Is there a list?

The Swiss Civil Procedure Code does not include any mandatory provisions regarding the appointment of a mediator. Swiss law leaves the appointment of mediators to the parties and does not provide for the intervention of any official body if the parties fail to agree on a mediator.

To the extent the relationship between the mediator and the parties is governed by Swiss law, it is considered as a simple agency contract and under Swiss law either party, including the mediator, has a right to terminate the relationship at any time.

There are many private mediation organisations in Switzerland offering ADR services and lists of (or referrals to) mediators, the most prominent of which are part of the working group Swiss Mediation Coordination (KMS) ([www.mediationschweiz.ch](http://www.mediationschweiz.ch)):

- a. The Swiss Bar Association ([www.sav-fsa.ch](http://www.sav-fsa.ch));
- b. The Swiss Chamber for Commercial Mediation ([www.skwm.ch](http://www.skwm.ch));
- c. The Swiss Chambers of Commerce and Industry's Arbitration Institution ([www.swissarbitration.org](http://www.swissarbitration.org));
- d. The Federation of the Swiss Mediation Associations ([www.swiss-mediators.org](http://www.swiss-mediators.org)).

### 8. Who is an eligible mediator? What hinders a mediator from accepting a mediation?

The Swiss Civil Procedure Code does not stipulate that a person must meet any professional requirements in order to act as a mediator.

Mediators are under a general obligation to disclose any circumstances that (may) affect their independence or constitute a conflict of interests (family, business relationship with one of the parties, financial interests in the outcome of the mediation, the mediator or a member of his or her firm having previously acted for one of the parties).

### 9. Can a lawyer mediate in your jurisdiction? Does he need training to be eligible?

Lawyers can act as mediators (and often do). Mediators with an education/training recognized by a professional association are in the focus whenever the law refers to mediation. The Swiss Bar Association has even created their own accreditation program.

**10. Can a Judge/Court be a mediator in your jurisdiction? If so, are there separate mediation sessions or can a mediation also occur within State Court Proceedings?**

The Swiss Civil Procedure Code (CPC) stipulates that mediation is independent from court proceedings and confidential. Therefore, a judge does not act as a mediator.

However, during Swiss (civil) court proceedings the court/judge may hold a so-called instruction hearing at any time during the proceedings. An instruction hearing is held to discuss the matter in dispute in an informal manner, to complete the facts, to attempt to reach an agreement and to prepare for the main hearing. This is as close as court proceedings may get to mediation as the judge is allowed to discuss the matter quite openly without any binding effect for the parties.

## **Mediation legislation / Relationship between State Courts and Mediation**

**11. Is there any state law regulation of mediation or mediators in your country? If so, what are the fundamental principles of such law?**

The main domestic source of law relating to mediation in civil matters is the CPC. It distinguishes between a so-called conciliation (art. 202–212 CPC) and mediation (art. 213–218 CPC). Although both terms refer to a process involving a neutral, the degree of compulsion imposed on the process and involvement of the neutral significantly differ between the two processes.

Conciliation is, as a rule, the mandatory preliminary phase in judicial proceedings in civil matters. It is conducted before the state-appointed conciliation authority according to the procedural rules set out in the CPC.

Mediation, on the other hand, is an extrajudicial dispute resolution process. The consent of all parties involved is required. Mediation is brought before a mediator, who is independent from the courts and from the conciliation authority.

The CPC does not govern the mediation process itself. The parties retain full authority to decide on the structure and procedure of the mediation.

**12. Do the Courts encourage or impose mediation, or impose sanctions for failure to explore mediation, or is it a purely voluntary process?**

Pursuant to the CPC, the parties, by a joint request addressed to the competent conciliation authority, may replace mandatory conciliation by mediation. If court proceedings are already pending, the parties may file a joint request before the court seized with the dispute that mediation be commenced. The court proceedings will then automatically be suspended throughout the mediation process. The CPC applies to mediations that are linked to judicial proceedings and have been commenced following a joint request addressed to the competent conciliation authority or to the court. The CPC in principle does not apply to mediations initiated without any such link to pending judicial proceedings, such as mediations initiated in the context of arbitration.

**13. Is an agreement reached during mediation enforceable? Does it need to be confirmed by a Court? What would be the consequences of said confirmation?**

In Switzerland, the final settlement agreement reached through mediation (judicial or non-judicial) typically takes the form of a binding contract.

In the context of judicial mediations, the settlement agreement may be ratified by the competent conciliation authority or by the courts upon the parties' joint request. The settlement agreement must either be in a written form with the signature of all parties involved or be formulated orally and agreed to by the parties jointly before the conciliation authority or court. Once ratified the settlement agreement has the effect of a binding court decision.

The parties may also elect to record the agreement reached through judicial or non-judicial mediation in the form of an official record issued by a notary public, which is then enforceable in the same way as a court decision.

**14. Are the mediation proceedings confidential? Is it possible for a party to submit in court elements revealed during the mediation proceedings? How?**

The CPC expressly provides that judicial mediation is confidential and independent of any court proceedings; no statement made by the parties during the mediation can be disclosed in subsequent court proceedings. This confidentiality obligation does not prevent the mediator from informing the courts about the identity of the parties to the mediation as well as about the beginning and the end of the process.

Pursuant to the CPC, mediators have the right to refuse testimony in civil proceedings on facts learnt in their capacity as mediators, but are under no procedural obligation to do so. If they testify, the mediators, however, remain liable towards the parties for any breach of their confidentiality obligations.

On the other hand, mediators are under the obligation to testify in criminal proceedings on facts learnt in the mediation. Although this question remains controversial under Swiss law, attorneys acting as mediators cannot refer on their duty of professional secrecy to refuse to give evidence in criminal proceedings, as such duty only covers the attorneys' core activity and does not extend to their activity as mediators.

## Conclusions

### 15. What are the pros and cons of mediation?

#### Pros:

- Parties may dedicate themselves to their own position;
- Formalities are low;
- Confidentiality: Mediation proceedings and results are private;
- Expeditious proceedings;
- Solution finding: parties can select a mediator who is skilled in the subject matter of the dispute and experienced in the negotiating strategy of the parties in dispute.

#### Cons:

- Both parties must agree to a resolution: waste of time and money in case the parties fail to find an agreement;
- Time delay in case of breakdown of the mediation;
- Concerns about the enforceability of a mediation agreement.

### 16. Is the mediation practice in your jurisdiction influenced by other countries' mediation practices?

Mediation in its modern form first appeared in the French part of Switzerland under the influence of its development in the United States and Canadian Quebec and was used primarily in family disputes. It then spread throughout Switzerland.



**17. Are costs of mediation perceived to be high/low in your country? Who pays for the mediation?**

In mediation proceedings conducted under the Swiss mediation rules, such as the rules of the Swiss Chamber of Commercial Mediation, a mediators' hourly rate generally ranges from CHF 200 to CHF 500. However, the parties and the mediator are free to agree on other rates. The mediators' fees are usually borne by the parties in equal parts.

There is no general right to a cost-free mediation. The CPC provides for cost-free mediation but only in certain family disputes (e.g. child custody, rights of visit) if the parties cannot afford mediation and the court recommends mediation. The right to legal aid is further regulated at a cantonal level. Most cantons provide for legal aid for judicial mediation if the parties cannot afford mediation. In some cantons legal aid is limited to those cases in which the court recommends mediation, whereas in others, it is only granted if the mediator selected by the parties is an authorised or sworn mediator or holds specific professional qualifications.

**18. Are there current mediation trends in your country?**

Mediation has all it needs for success in Switzerland: various training programmes and certifications for mediators and with the introduction of the Swiss Civil Procedure Code in 2011, parties were given the opportunity to choose between the long-standing state conciliation procedure and mediation.

However, attorneys and parties are still reluctant to depart from the old habits and give mediation a try. It will still take time for mediation to become "daily business".

**19. Do you use any other forms of Alternative Dispute Resolution ('ADR') in your country? If so, please give a brief description of each of those.**

For over a century, Switzerland has had a long-standing tradition in arbitration and it has been one of the preferred hosting venues for international arbitrations, whether (ad hoc or proceedings under the rules of the leading arbitration institutions). It remains today one of the most preferred places for international arbitration. Switzerland is one of the major venues for international arbitration. Many factors account for this reputation, in particular neutrality, a secure and predictable legal framework, access to qualified Swiss and foreign arbitrators and counsel as well as a developed infrastructure. Switzerland has a modern and liberal international arbitration law in Chapter 12 of the Swiss Private International Law Act (PILA), which grants the parties to arbitration wide party autonomy.

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