

SWITZERLAND

Mediation in Switzerland: or the 'Swiss Army knife tool'¹

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Overview of the legal framework

Switzerland is certainly the mediator's state *per se!* Indeed, its independence and impartiality, the neutrality of the Swiss cantons recognised since 1648,² and its well-known confidentiality rules together with its specific role towards conflict resolution within the international framework³ have naturally led Switzerland to play an important part in the alternative dispute resolution (ADR) field.

In Switzerland, civil and particularly commercial disputes are subject to a framework of dispute resolution tools (DRT), including negotiation, mediation, ombudsman,⁴ conciliation, arbitration, as well as ordinary legal proceedings. In these matters, subject to public order and to some mandatory rules, the parties are free to choose their DRT, and even to navigate between the diverse systems⁵ offered.

With respect to legal proceedings, Switzerland is currently a federal system of 26 cantons, operating with 26 cantonal laws of civil and criminal procedure as well as 26 laws of judicial organisation in addition to the federal laws.

In 2010, it is expected that all civil procedures will be unified in one Swiss civil procedural law⁶ and it is intended that the new uniform civil procedure will to some extent provide mediation as an official alternative to pre-trial conciliation. It is also currently under discussion as to whether and to what extent the draft bill of Swiss criminal procedural law⁷ (general federal law) should also contain some articles on mediation as does the Swiss criminal procedural law for minors, which will come into effect on 1 January 2007.⁸

At the present stage, not all the cantonal civil procedure laws contain provisions on ADR. Whereas judicial conciliation has been known in Switzerland for at least two centuries and arbitration⁹ for one century, mediation has existed only for a decade and not in each canton.

Actually, it is only in Geneva that civil and criminal mediation is institutionalised in the judicial system.¹⁰ It can, however, be found outside the judicial system in the cantons of Aargau, Basel, Fribourg, Neuchâtel, St Gallen, Solothurn, Ticino, Vaud and Zurich.

To some extent, mediation has been codified in the

following cantonal laws:

- Aargau: penal code for minors¹¹
- Basel: intercultural mediation
- Fribourg: penal code for minors¹² and collective conflicts in labour law¹³
- Glaris: family matters
- Neuchâtel: penal code for minors and family matters¹⁴
- Ticino: family matters¹⁵
- Zurich: family matters (a further 'draft pilot programme' allows the judges to act as mediators)

Some cantons are currently experimenting with mediation within certain fields of law in view of the future codification of the process.¹⁶

Geneva rules on civil/commercial mediation

In Geneva, the new rules on civil and commercial mediation entered into force on 1 January 2005.¹⁷ The new law can be found at: www.skwm.ch/wDeutsch/dokumente/Dokumente_franz/mediation_civile.pdf

Mediation can be initiated prior to any court proceeding or after a lawsuit has been filed with a court.

There is no assignment of mediations by the judge, who only proposes mediation to the parties. Thus, there is neither judicial control of the mediation process as such, nor of the substance, nor of the formal aspects (rules, duration, costs, co-mediation, etc).

However, there is a clear codification of the rules of ethical conduct:

- confidentiality of the mediation proceedings and independence, neutrality and impartiality of the mediator.
- The Geneva rules specifically oblige the mediator, who affirms on oath, to keep the mediation process, as well as all the facts learned, secret, without time limitation. Any infringement can lead to disciplinary as well as penal sanctions.¹⁸
- In the other cantons, the duty of confidentiality is usually mentioned in the mediation agreement. However, the validity and enforceability of such a commitment has not yet been decided by any court. To some extent, financial legal assistance is available for mediation in Geneva.

Statute of limitations and suspension of legal proceedings

At the present time, the starting of a mediation proceeding is not considered a suspension or interruption of the statute of limitations.¹⁹ However, the parties usually mutually agree on the suspension of the legal proceedings up to the end of the mediation process.

Acknowledgement and enforcement of mediation (settlement) agreements

If requested, notably for enforcement purposes, an official ratification of the settlement agreement reached through mediation (out of or during court proceedings²⁰) can be achieved through a quite simple and rapid procedure in the form of either *a court decision or an arbitration award*.

The judge/arbitrator cannot modify the content of the concluded settlement agreement that has been reached, unless there is an infringement of public order or a Swiss mandatory rule.

A 'practical guide for civil mediation' has been drafted by the Geneva authorities; this can be found at www.geneve.ch/tribunaux/pouvoir-judiciaire/mediation.html. Also at this address is an official list of court-accredited mediators as well as mediation institutions.

The Geneva rules are Euro-compatible.²¹

Mediation procedures

Mediation procedure is not regulated by law in Switzerland. Several mediation organisations have adopted procedural rules that the parties may incorporate into their mediation agreements.²² Furthermore, the parties often mediate under the rules of national or international organisations such as the Swiss Chamber of Commercial Mediation Rules, WIPO Rules, ICC ADR Rules, CEDR Model Mediation Procedure and Agreement, etc.

Mediators' fees are not regulated in Switzerland and fees in commercial mediations are often based upon hourly fees of lawyers.

Taking the well-known 'Swiss Rules on International Arbitration'²³ as a model, the Swiss Chambers of Commerce is currently in the process of drafting the 'Swiss Rules on Mediation' which are intended to come into effect in 2007.

Enforceability of a mediation clause in Switzerland

Some legal scholars and the current Swiss case law consider a mediation clause to be of a purely contractual nature without any procedural consequences. As a result, a party's breach of its contractual obligation to mediate before submitting a dispute to the courts does not constitute an impediment to that court's jurisdiction.²⁴

However, this situation might change as legal scholars seem to be following the position taken in the neighbouring state of France. A French court recently held that courts must give effect to a mediation clause if one party relies on it and therefore stay court proceedings in breach of such a clause.²⁵

Thus, in order to avoid any problem, the parties should clearly define whether they have (or do not have) an obligation to mediate prior to the commencement of arbitration or court proceedings and, if necessary, provide for some penalty in case of violation of said obligation.

Mediation in Switzerland

Apart from international organisations and NGOs which provide for ADR rules including mediation, many various private associations offer mediation in Switzerland in various sectors: family, commercial, governmental agencies, labour, schools, environment, etc.

Description of the main ADR providers with links to their websites

- Swiss Chamber for Commercial Mediation (SCCM/CSMC/SKWM)
www.skwm.ch or www.csmc.ch
Four sections: German-speaking Switzerland (Zurich region and central Switzerland), French-speaking Switzerland and Italian-speaking Switzerland.
- Federation of the Swiss Mediation Associations (FSM/SDV)
www.infomediation.ch
This organisation groups some of the most important mediation associations of Switzerland.
- Swiss Lawyers Association (FSA/SAV) – Mediation Commission
www.swisslawyers.com
This association includes the main Bar Associations of Switzerland. All of them have adopted guidelines and ethical codes of conduct for conventional mediation. In addition, it offers training for lawyers and qualifies participants with the title of 'Mediator of the Swiss Bar Association'.²⁶
- Cantonal Mediation Associations:
 - (1) Groupement Pro Mediation (five Cantons)
www.mediations.ch
 - (2) Maison Genevoise des Médiations (Genève)
www.mgem.ch
 - (3) Maison Neuchâteloise de la Médiation (Neuchâtel) www.medialogue.ch
 - (4) Verein Mediation Region Basel (Basel)
www.mediation-basel.ch

- (5) Maison Fribourgeoise des médiations (Fribourg)
www.fribourg-mediation.ch
- (6) Associazione Ticinese per la Mediazione (Ticino)
www.mediazione.ch
- (7) Verein Mediation im Strafverfahren (Aargau)
www.medistaargau.ch

Mediation rules of specific international institutions in Switzerland

- Court of Arbitration for Sport (CAS)
Avenue de l'Elysée 28, CH – 1006 Lausanne
www.tas-cas.org
- World Intellectual Property Organisation (WIPO)
Arbitration and Mediation Center
34 Chemin des Colombettes
PO Box 18 CH-1211, CH - Geneve 20
www.arbiter.wipo.int

International Mediation Training in Switzerland

- Institut Universitaire Kurt Bösch, IUKB, Sion
www.iukb.ch
Masters degree in International Mediation
- WIPO Arbitration and Mediation Center
www.arbiter.wipo.int
- World Mediation Forum
www.mediate.com

Notes

- 1 Tom Stipanowich, IBA Annual Conference, Chicago, September 2006. In his speech, he likened the mediation process to a Swiss Army knife – a dispute resolution tool with various applications.
- 2 Treaty of Westphalien.
- 3 International Red Cross, UN, WTO, etc.
- 4 Notably in insurance, banking and travel matters.
- 5 ie legal proceedings with mandatory conciliation suspended pending a mediation agreement being reached.
- 6 Articles 210ss Projet Code de procédure civile federal/Schweizerische Zivilprozessordnung: a project has already been drafted and will be discussed by the Swiss Parliament soon. All cantonal civil procedural laws on mediation will then be superseded by the federal civil procedural law (www.bj.admin.ch/bj/fr/home/themen/staat_und_buerger/gesetzgebung/zivilprozessrecht.html).
- 7 Article 317, Projet Code de procédure pénale suisse/Schweizerische Strafprozessordnung.
- 8 Article 18, Code de procédure pénale applicable aux mineurs/Schweizerische Strafprozessordnung für Jugendliche.
- 9 Arbitration is enclosed in all cantonal laws of civil procedure in Switzerland and the 'Swiss Rules for international arbitration' enacted by the chambers of commerce are very often used in commercial dispute resolution.
- 10 The Geneva law on criminal procedure covers mediation in criminal matters, since January 2001, and the Geneva laws on civil procedure as well as on judicial organisation cover mediation in all civil and, notably, commercial matters since January 2005.
- 11 Articles 3 and 8, Jugendstrafgesetz Arau.
- 12 Ordonnance du 16 décembre 2003 sur la médiation dans la juridiction pénale des mineurs (OMJPM) (RSFR 132.62).
- 13 Loi du 30 septembre 1988 instituant un Office de conciliation en matière de conflits collectifs de travail (RSFR 862.2) et Règlement du 5 février 1990 d'exécution (RSF 862.21).
- 14 Article 365 of the Code de procédure civile NE and article 12, LICC Loi d'introduction du code civil NE.
- 15 Articles 107 and 352 of the Codice di procedura civile ticinese.
- 16 Fribourg, Neuchâtel, Vaud and Zurich: in divorce cases, commercial disputes and criminal proceedings involving minors.
- 17 Loi sur la médiation civile de la République et Canton de Genève du 28 octobre 2004.
- 18 Article 161 H, Loi sur l'organisation judiciaire genevoise and article 38 al. 1, ch 54, Loi pénale genevoise. In family mediation, the Federal civil law already prevents the mediator from testifying (article 139, Swiss Civil Code).
- 19 Article 134 Swiss Code of Obligations.
- 20 So-called 'homologation judiciaire': articles 71d and 71f, Loi de Procédure civile genevoise.
- 21 Recommendation no R (98)1 of the Committee of the Ministers of States of the Council of Europe on family mediation and Recommendation no Rec (2002)10 on mediation in civil matters.
- 22 ie the mediation rules of the Swiss Chamber for Commercial Mediation (csmc.ch).
- 23 www.swissarbitration.ch
- 24 Swiss Federal Court decision of 23 August 1999 in (2000) 99 ZR 29.
- 25 *Poiré v Tripier*, Decision of 14 February 2003 of the French Court de Cassation in (2003) Rev Arb 403.
- 26 Médiateur FSA or SAV Mediator. For instance, special training is available on the role of lawyers acting as mediators.