

# Mediation

In 20 jurisdictions worldwide

*Contributing editor*  
**Renate Dendorfer-Ditges**



2015

GETTING THE  
DEAL THROUGH 

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DEAL THROUGH 

# Mediation 2015

*Contributing editor*

**Renate Dendorfer-Ditges**

**Heussen Rechtsanwalts-gesellschaft mbH**

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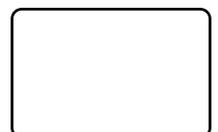


Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 7908 1188  
Fax: +44 20 7229 6910

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First published 2012  
Third edition  
ISSN 2051-4697

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Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



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# Switzerland

Domitille Baizeau and Catherine A Kunz

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## Law and institutions

### 1 Treaties

**Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?**

Switzerland is not a signatory to any treaty referring to mediation, other than multilateral or bilateral treaties regarding the settlement of international disputes (eg, the Hague Convention for the Pacific Settlement of International Disputes of 18 October 1907) or treaties on specific matters that encourage the use of mediation in given situations (eg, the Hague Convention of 13 January 2000 on the international protection of adults). Switzerland's domestic mediation law is not based on a treaty such as the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (2002) (the UNCITRAL Model Law). Nor is Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (Directive 2008/52/EC) directly applicable, since Switzerland is not a member of the European Union.

However, the Swiss legislator has sought to align Switzerland with the United States, Canada and the European Union in the effort to promote mediation as an alternative form of dispute resolution by introducing, for the first time at the federal level, provisions concerning mediation in civil matters as part of the uniform Swiss Code of Civil Procedure (SCCP) that entered into force on 1 January 2011. The essential features of Directive 2008/52/EC have thus now been transposed in the SCCP.

### 2 Domestic mediation law

**What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?**

The main domestic source of law relating to mediation in civil matters is the SCCP. Unlike the UNCITRAL Model Law, Swiss domestic law distinguishes between 'conciliation' (articles 202–212 SCCP) and 'mediation' (articles 213–218 SCCP). 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, a 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 SCCP. The judge may also, at any time during the judicial proceedings on the merits, act as conciliator by assisting the parties to reach an amicable solution.

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 SCCP only articulates the relation between mediation and judicial proceedings in civil matters, but does not govern the mediation process itself. The parties retain full authority to decide on the structure and procedure of the mediation. Pursuant to the SCCP, 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 SCCP 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 (referred to hereinafter as 'judicial mediations'). The SCCP in principle does not apply to mediations initiated without any such link to pending judicial proceedings ('non-judicial mediations'), such as mediations initiated in the context of arbitration.

There are no specific statutory provisions governing foreign mediation or the mediation of international cases.

Swiss law also provides for mediation in relation to international child abduction and the protection of adults, to federal administrative proceedings, to certain disputes involving federal authorities, and to settle a victim's civil claims and criminal complaints against a juvenile criminal offender.

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### 3 Mandatory provisions

**Are there provisions of domestic mediation law that must be considered in mediation proceedings?**

Mediation itself is not subject to any mandatory provisions of Swiss law.

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.

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### 4 Obligation to mediate

**Is mediation in your country obligatory? Can mediation be ordered by courts in your country?**

Swiss law distinguishes between conciliation and mediation.

Under Swiss law, conciliation is mandatory and a necessary preliminary phase for civil judicial proceedings. The obligation to conciliate is lifted in exceptional circumstances, such as where the value in dispute exceeds 100,000 Swiss francs and the parties have, by mutual agreement, waived their right to conciliation or where the defendant is domiciled abroad. In the event of non-participation in the conciliation by the plaintiff, the claim is deemed to have been withdrawn, the case is dismissed and the costs of the conciliation proceedings are ordered against the plaintiff; if the defendant is in default, the conciliation authority proceeds as if no settlement agreement had been reached and authorises the plaintiff to proceed on the merits. Although the conciliation costs are also charged to the defendant, they will be included in the overall court costs that can be recovered by the plaintiff if it prevails in subsequent judicial proceedings.

By contrast, mediation is by essence a voluntary and extrajudicial process, which is why there is no obligation to mediate. Even in family disputes, where the law provides that the court can 'exhort' the parties to mediate, the court has no power to compel the parties to do so. However, in family law matters, according to case law, the guardianship authority may order mediation if it is in the child's interest despite one of the parents' reluctance to mediate. In all civil matters, the courts may also at any time advise the parties to resort to mediation to solve their dispute rather than to pursue court proceedings. There are no sanctions if the parties (or one of the parties) refuse to follow the court's recommendation to mediate.

## 5 Court-annexed mediation

### Does the law of your country provide for court-annexed mediation? If so, is court-annexed mediation mandatory?

In Switzerland, both judicial and non-judicial mediations in civil matters are 'out-of-court' processes, by which the dispute is referred to any third party selected by the parties to act as a neutral and not to a member of the judiciary. Civil courts cannot order the parties to resort to mediation although they can encourage them to do so.

The SCCP provides a link between judicial mediations and civil court proceedings. The SCCP thus allows the parties to resort to mediation to replace mandatory conciliation, which is the first phase in any civil court proceedings, or to commence mediation at any time during pending civil court proceedings. The court proceedings will then automatically be suspended throughout the mediation process (see question 2). The settlement agreement reached in the context of such judicial mediations may be ratified by the conciliation authority or the courts, in which case it will have the effect of a binding court decision (see question 10).

In relation to certain juvenile criminal matters, the authority in charge of the process can either act as conciliator or mandate an organisation or neutral third party to act as mediator between the juvenile criminal offender and its victim (court-annexed mediation). Here too, the mediation is an 'out-of-court' process.

## 6 Mediation-arbitration and other forms of mediation-related ADR

### Is mediation combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge? Are arbitrators aware of mediation, and if yes, are they willing to transfer arbitration cases to mediation? Which other proceedings are available and used in your country that are related to mediation?

It is quite common to find multi-tiered arbitration clauses providing that the parties must first seek to settle their dispute through alternative dispute resolution mechanisms, such as negotiation, mediation or conciliation, prior to commencing arbitration. This is particularly the case in international construction or infrastructure contracts or merger and acquisition agreements. The model mediation clause of the Swiss Rules of Commercial Mediation (the Swiss Mediation Rules) issued by the Swiss Chambers of Commerce and Industry in 2007, for example, provides for a two-tier arbitration clause in the form of a classic med-arb process: the parties are required to attempt mediation for a period of 60 days before commencing arbitration under the Swiss Rules of International Arbitration (the Swiss Arbitration Rules).

Swiss arbitrators are generally aware and in favour of mediation. There is no data on whether they tend to actively encourage the transfer of arbitration cases to mediation or generally tend to encourage the parties to resort to mediation. What Swiss arbitrators do tend to do is actively encourage the parties to consider settlement, as the case may be using the arbitrator as a settlement facilitator.

Again there is little empirical evidence available on the use of hybrid clauses such as med-arb or arb-med clauses, where the same neutral would typically act as both mediator and arbitrator, because of the confidentiality of both sets of proceedings.

Although there is no specific statutory provision or case law prohibiting the same neutral from acting as both mediator and arbitrator in the same dispute, a person acting as arbitrator after having acted as mediator could be challenged for want of impartiality and independence based on the information obtained during the course of the mediation. However, to avoid this issue, the parties can agree in advance to waive their right to challenge the arbitrator on that ground. This is reflected in the Swiss Mediation Rules (article 22), which provide that the mediator cannot act as arbitrator or judge in any subsequent proceedings initiated against one of the parties to the mediation after the commencement of the mediation, unless the parties expressly agree otherwise. The Swiss Arbitration Rules (article 15(8)) further provide that the arbitrator, with the agreement of the parties, may take steps to facilitate the settlement of the dispute, in which case the parties' agreement is deemed to constitute a waiver of their right to challenge an arbitrator's impartiality based on the arbitrator's participation in the agreed steps and knowledge acquired in that context.

By contrast, in the context of a judicial mediation the mediator cannot subsequently act in the same dispute as conciliator or judge and this prohibition cannot be displaced by the parties' agreement.

In addition to mediation, the only other form of mediation-related ADR that is regulated under Swiss law is conciliation (see questions 2 and 4), but parties are free to agree on other forms, including, for example, adjudication, which is regularly used in construction and engineering contracts (eg, the Dispute Adjudication Board provided for in contracts subject to general conditions established by the International Federation of Consulting Engineers (FIDIC)). Disputes are also often referred to private or public ombudsmen, namely, conciliation officials who typically handle disputes between consumers and service providers in certain sectors (eg, in the insurance, banking, telecommunications or travel sectors, see question 19) or between citizens and Swiss administrative authorities.

## 7 Online dispute resolution (ODR)

### Have there been any developments regarding online dispute resolution in your country? Is your country participating in any international ODR project? Is online mediation available in your country?

No. Switzerland is not an EU country and there are at present no measures implementing or mirroring the European ODR legislation providing for online dispute resolution for consumer disputes in Switzerland. Switzerland is not participating in international ODR projects such as ODR Exchange or ECODIR.

## 8 Confidentiality and disclosure

### Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

Regarding confidentiality, again, a distinction between judicial and non-judicial mediation needs to be made.

The SCCP 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. Swiss federal law is, however, silent on the confidentiality of the documents produced in the mediation. Some cantonal laws specifically prohibit the production of the mediator's files in administrative or judicial proceedings. There is also no sanction that may be imposed on the party who discloses confidential information or documents obtained through judicial mediation to a court; absent consent, however, the court will have to ignore any information or documents provided in breach of a party's confidentiality obligations.

According to legal scholars the principle of confidentiality of the mediation anchored in the SCCP extends to non-judicial mediations. There is, however, no case law or statutory provision to that effect.

The question of whether contractual confidentiality clauses contained in mediation agreements or rules referred to by the parties (eg, for mediations conducted under the Swiss Mediation Rules, see article 18) are valid and enforceable by courts is not yet settled under Swiss law. Given that the confidentiality of the mediation process is now expressly provided for in the SCCP, it is to be hoped that the courts would also enforce contractual confidentiality clauses to the same effect. The same should apply to arbitration, although again there is no case law on this point. A party should be able to rely on an agreement reached prior to commencing the mediation to the effect that the mediation is confidential and without prejudice to the parties' position in any subsequent arbitral proceedings; the arbitrators would then have to disregard the information and documents disclosed in breach of that agreement.

Pursuant to the SCCP, mediators have the right to refuse to testify in civil proceedings on facts learnt in their capacity as mediators both in judicial and non-judicial mediations, 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, lawyers acting as mediators cannot rely on their duty of professional secrecy to refuse to give evidence

in criminal proceedings, as such duty only covers the lawyers' core activity and does not extend to their activity as mediators.

## 9 Limitation period

### Does a mediation proceeding suspend the limitation period for a court claim?

Only judicial mediations covered by the provisions of the SCCP suspend the statutory limitation period for a court claim.

In all other cases, including in the context of international arbitration, mediation as a purely contractual dispute resolution mechanism does not interrupt any statutory limitation period. Claims may therefore become time-barred during the mediation process. To avoid the issue, the parties usually agree to a waiver of the right to rely on statutory limitation for the duration of the mediation.

## 10 Settlement

### What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

In Switzerland, the final settlement agreement reached through mediation (judicial or non-judicial) typically takes the form of a binding contract, which can be a detailed agreement settling all issues in dispute, an agreement in principle on the main issues or even a promise to enter into a contract if it covers the essential points of the contemplated contract (in which case, under Swiss law, the promise to contract is binding on the parties). Although the written form is not required under Swiss law, most mediation rules provide that settlement agreements must be in writing and signed by the parties, which reflects the common practice.

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.

A similar mechanism exists for mediations conducted in relation to a pending or subsequent arbitration where the parties can turn to the arbitral tribunal and request that the settlement agreement be recorded in an award on agreed terms. This possibility is expressly provided for in the Swiss Mediation Rules (article 23) and Swiss Arbitration Rules (article 34(1)).

Finally, 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. The law, however, sets minimal requirements as to the content of the official record; it must in particular contain the recognition by the obligor that the performance of his or her obligation is due and an express declaration that he or she accepts its direct enforcement.

## 11 Mediation institutions

### What are the most prominent mediation institutions in your country?

There are many private mediation organisations in Switzerland offering alternative dispute resolution services in various fields, the most prominent of which are part of the working group Swiss Mediation Coordination (KMS) ([www.mediationschweiz.ch](http://www.mediationschweiz.ch)), namely:

- the Swiss Chamber for Commercial Mediation (SCCM/CSMC/SKWM) ([www.skwm.ch](http://www.skwm.ch)), which has five regional branches and is active in all linguistic regions of Switzerland. It is dedicated to the promotion and development of mediation as a method for resolving business conflicts, and therefore focuses on commercial mediation;
- the Swiss Chambers of Commerce and Industry's Arbitration Institution ([www.swissarbitration.org](http://www.swissarbitration.org)). The Chambers of Commerce of Basel, Berne, Geneva, Lausanne, Lugano, Neuchâtel and Zurich offer mediation services based on the Swiss Mediation Rules, which were adopted to ensure compatibility between commercial mediation and arbitration (see the Swiss Arbitration Rules) and provide arbitrators and mediators with a greater range of procedural options for resolving disputes;

- the Federation of the Swiss Mediation Associations (FSM/SDV) ([www.infomediation.ch](http://www.infomediation.ch)), which is an organisation bringing together the most important private mediation associations of Switzerland;
- the Swiss Lawyers Association (FSA/SAV) – Mediation Commission ([www.swisslawyers.com](http://www.swisslawyers.com)), whose members are lawyers registered with one of the Swiss bar associations; and
- the Swiss section of the European Association of Judges for Mediation ([www.gemme.ch](http://www.gemme.ch)).

Further private mediation organisations are:

- the Mediationsforum Schweiz ([www.mediationsforum.ch](http://www.mediationsforum.ch)), which is an association for mediators who hold a certificate of advanced studies in mediation from the University of Applied Sciences and Arts of Northwest Switzerland; and
- cantonal mediation associations, for example, Groupement Pro Médiation ([www.mediations.ch](http://www.mediations.ch)), which promotes mediation in the French-speaking part of Switzerland, the association mediationbern ([www.mediationbern.ch](http://www.mediationbern.ch)) in Berne, the association Verein Mediation Region Basel in Basel (<http://mediation-basel.ch>) and Zurich Mediation Coordination ([www.mediatoren-zh.ch](http://www.mediatoren-zh.ch)), which is a regional subgroup of the KMS working group and holds a list of Zurich-based accredited mediators.

In addition, several Swiss-based international institutions provide mediation services:

- the World Intellectual Property Organization (WIPO), Arbitration and Mediation Center ([www.wipo.int/amc](http://www.wipo.int/amc)), which offers alternative dispute resolution mechanisms that are particularly appropriate for technology, entertainment and other disputes involving intellectual property; and
- the Court of Arbitration for Sport (CAS) ([www.tas-cas.org](http://www.tas-cas.org)), which offers mediation services in relation to sports-related disputes, to the exclusion of disputes relating to disciplinary matters and doping issues.

Finally, private and public ombudsmen act as conciliation officials in disputes between consumers and service providers in a number of sectors (see question 19) or between citizens and Swiss administrative authorities.

## Mediation procedure

### 12 Background

#### Describe the development of mediation in your country.

Switzerland has a long-standing tradition of having recourse to mediation and conciliation as an alternative to judicial proceedings and counts several public and private ombudsmen (see question 11).

Mediation in its modern form first appeared in the French-speaking part of Switzerland in the 1980s under the influence of its development in the United States and Canadian Quebec and was used primarily in family disputes. It then rapidly spread throughout Switzerland.

In 2005, statutory provisions on mediation in civil matters were enacted for the first time at the cantonal level in Geneva. Mediation was shortly thereafter introduced at the federal level in relation to federal administrative proceedings and juvenile criminal matters. It also found its way into the codes of (civil or criminal) procedure of several other cantons.

In parallel, in 2007, the Swiss Chambers of Commerce and Industry issued the Swiss Mediation Rules, shortly after the adoption of the 2006 revised Swiss Arbitration Rules, with a view to promoting mediation as a new procedural option compatible with arbitration.

A new impulse was given to mediation in Switzerland with the entry into force of the SCCP in January 2011. The SCCP generally increased the importance of mediation as a tool for resolving disputes by articulating the relationship between mediation and court proceedings and setting up judicial mediation to a true alternative to conciliation.

### 13 Areas of disputes for mediation

#### In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

In Switzerland, mediation is most often applied in family disputes as well as in relation to juvenile criminal offences. However, mediation is also used in a variety of other fields, ranging from projects with a major environmental impact, to neighbourhood conflicts, labour law disputes, commercial

disputes or disputes between administrative authorities and cantons or disputes between cantons and the Swiss Confederation.

#### 14 Procedural requirements

##### **Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?**

The only procedural requirement provided under Swiss law in relation to judicial mediation is that the process be initiated jointly by all parties involved.

As party autonomy prevails in mediations conducted in Switzerland the parties are as a rule responsible for the organisation and conduct of the mediation.

In mediations conducted under the Swiss Mediation Rules, the mediation is generally commenced by the filing of a request for mediation by the party or parties wishing to have recourse to mediation; thus, contrary to judicial mediation, a joint request is not required. However, absent a prior agreement to mediate, the mediation shall only commence if the other party or parties agree to participate in the mediation. The request for mediation must include the identities and details of the parties involved, and, if it exists, a copy of the agreement to mediate, a short description of the dispute and estimate of the amount in dispute, the designation or criteria for designation of a mediator, the language of the proceedings and the payment of the registration fee. The Swiss Mediation Rules, however, expressly reserve the parties' freedom to define other rules of procedure.

#### 15 Structure and process of mediation

##### **Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?**

The structure and process of a mediation conducted in Switzerland very much depend on the procedural rules adopted by the parties. In commercial mediations, it is not uncommon for the mediator to receive statements from the parties setting out their presentation of the facts and position, together with underlying documents, prior to the mediation session. Nor is it uncommon for the mediator to have individual discussions with each party (often through their attorneys) in order to gain a clearer picture of the factual background or of the current state of discussions between the parties in advance of and in preparation for the mediation.

However, the structure of the mediation varies from case to case and various models are used, without there being a predominant model or significant differences from one model to the other.

The model presented here is a well-established five-phase model:

- pre-mediation phase: the purpose of this phase is to clarify the parties' expectations, inform the parties on the mediation process and of the role of the mediator, lay down the procedural rules, the rules of conduct, the language of the process (including the use of a foreign language), discuss the confidentiality of the mediation and other organisational matters;
- presentation of the facts: in this phase, each party first presents its version of the relevant facts of the dispute and its position; with the assistance of the mediator, the parties then determine the issues at stake and the order in which these issues will be addressed during the mediation;
- communication: this phase allows the parties to explain their positions, to clarify the facts, the parties' underlying interests and the legal issues at stake, so as to enable the parties to reach a mutual understanding of the problem and scope of the conflict;
- possible solutions: the purpose of this phase is to 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; and
- settlement agreement: its purpose is to formulate and finalise the settlement agreement reached by the parties through the mediation.

The parties are free to determine the time frame of the mediation. The absence of procedural formalities allows the mediation to be conducted in a speedy and efficient manner, which is why mediation is generally significantly shorter than court or arbitral proceedings. In mediation proceedings in commercial matters, including judicial mediation, it is common that several consecutive meetings take place within a given time

period. However, one or two full-day sessions are often sufficient to settle the dispute or to conclude that it cannot be resolved through mediation.

The parties are free to choose the language of the proceedings.

#### 16 Mediation style

##### **What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joined sessions, or both, commonly used in mediation?**

The mediation style in Switzerland for commercial mediation tends to be primarily facilitative and interest-based. Although mediation primarily takes the form of joint sessions, private sessions (caucuses) are also commonly used. Caucuses would typically be used to discuss with the parties how to raise certain issues in a joint session, rather than to determine their interests or to explore possible solutions.

#### 17 Co-mediation

##### **What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?**

In a majority of cases, mediations are brought before a sole mediator. However, co-mediation or the assistance of an expert in the course of the mediation is also used. Co-mediation is, for example, found in family disputes, involving both a lawyer and a psychologist as co-mediators. It is, however, also used in commercial mediation.

#### 18 Party representatives and third parties

##### **What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?**

It is not uncommon for party representatives, such as lawyers or other external advisers, to assist their client during the mediation proceedings. This is particularly true for judicial mediation (which is often related to pending but stayed court proceedings). The Swiss Mediation Rules expressly provide for the parties' right to be assisted by such representatives.

The parties are free to agree that expert or witness evidence be allowed in the mediation proceedings.

#### 19 Specific mediation procedures / conflict or dispute management systems

##### **Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is there any reported or published information regarding dispute management systems of companies for conflicts in employment matters?**

There are to our knowledge only a small number of Swiss-based companies that have set up their own internal dispute management system.

The WIPO and the CAS can be cited as examples of institutions that offer mediation to their customers or users; however, they are international institutions that are simply based in Switzerland.

Switzerland has several private ombudsmen that offer mediation and conciliation services for claims brought by consumers against service providers in certain sectors. For example, the Swiss Banking Ombudsman ([www.bankingombudsman.ch](http://www.bankingombudsman.ch)) deals with specific complaints that are raised against banks based in Switzerland. The services of the ombudsman are free of charge for the banks' clients. Other ombudsmen are, for example, the ombudsman of the Swiss Travel Industry ([www.ombudsman-touristik.ch](http://www.ombudsman-touristik.ch)), the ombudsman of the Swiss health insurance (<https://secure.om-kv.ch>), the ombudsman of private insurance and the Swiss National Accident Insurance ([www.ombudsman-assurance.ch](http://www.ombudsman-assurance.ch)) or the ombudsman for the telecommunications sector ([www.ombudscm.ch](http://www.ombudscm.ch)).

ODR is, for example, used for disputes concerning the use of domain names .ch and .li, for which the rules of the Swiss domain name registration authority provide for conciliation or expert decision using the WIPO's

online dispute resolution services. To the best of the authors' knowledge, there are no Swiss ODR platforms, although some Swiss-based mediators offer online mediation services through international platforms.

With respect to the management of conflicts in employment matters, the Federal Supreme Court has held that employers are under an obligation to designate a person of trust from outside the professional reporting hierarchy to deal with potential or existing work-related conflicts or to have an alternative dispute management system which ensures a similar level of protection for their employees.

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## Mediation clauses and mediation agreement

### 20 Mediation clauses

**Are mediation clauses commonly considered in the course of contract drafting? Are there special requirements for mediation clauses? Are there any relevant court decisions referring to such escalation clauses?**

Although mediation clauses are considered from time to time in the course of contract drafting, it is more common to find a multi-tiered escalation clause for dispute resolution providing for the obligation to negotiate first before arbitration or litigation proceedings can be initiated.

The enforcement of multi-tiered clauses has been examined by the Federal Supreme Court, which has stressed that the obligation to mediate or conciliate prior to arbitration must be clearly expressed for such a multi-tiered clause to be considered binding. In one case, the dispute resolution clause in the contract provided that 'the parties will first seek to find an amicable settlement' and that the dispute 'will be submitted, after the failure of the conciliation attempt, to an arbitral tribunal'. The Federal Supreme Court held that this clause contained an obligation for the parties to attempt to reach an amicable agreement before resorting to arbitration but that, in this instance, the fact that the parties had held discussions (even informally) was sufficient to satisfy this obligation. The question of whether 'amicable settlement' was to be considered the same as 'conciliation' was unfortunately not addressed.

In another recent decision, the Federal Supreme Court analysed the escalation clauses contained in the Conditions of Contract for Construction (First Ed. 1999) established by the FIDIC and held that, as a general rule, a decision from the Dispute Adjudication Board (DAB) was a prerequisite before the parties could refer their dispute to arbitration, save where the DAB fails to render its decision within 84 days. In that case, the Federal Supreme Court held that in view of the significant delays caused by the defendant in the constitution of an ad hoc DAB and the specific circumstances of the case, in accordance with the general principle of good faith, the appellant was entitled to initiate arbitral proceedings before the DAB had been constituted and had rendered its decision.

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### 21 Conclusion and content

**Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?**

Mediation being a voluntary process, all parties involved must agree to mediate their dispute. There is no statutory requirement for the mediation agreement to be in writing; it is however generally required under the rules issued by Swiss mediation institutions.

The Swiss Mediation Rules for example expressly provide that when a party files a request for mediation and there is no prior agreement to mediate, the mediation proceedings shall only commence if the other party or parties involved consent to the mediation in writing (article 5).

There is no requirement under Swiss law regarding the content of the mediation agreement.

The agreement between the mediator and the parties is governed by the provisions of the Swiss Code of Obligations dealing with the simple agency agreement and is not subject to any specific requirement. Again, there is no requirement that it be in writing.

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### 22 Costs for mediation

**Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?**

There are no statutory provisions governing the mediators' fees under Swiss law.

In mediation proceedings conducted under the Swiss Mediation Rules or the rules of the Swiss Chamber of Commercial Mediation, the mediators' hourly rates generally range between 200 and 500 Swiss francs. The parties and the mediator are, however, free to agree on other rates.

Mediators' fees are, as a rule, borne by the parties in equal shares.

Regarding judicial mediation, the SCCP provides for cost-free mediation but only in family disputes for non-financial matters concerning children (eg, child custody, rights of visit) if the parents cannot afford mediation and the court recommends mediation. There is no general right to a cost-free mediation.

The right to legal aid is regulated at the 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 (eg, Geneva) or holds specific professional qualifications (eg, subject to the mediator being a lawyer registered with a Swiss bar). There is no legal aid available for non-judicial mediations.

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### Professional matters for mediators

#### 23 Regulation

**Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?**

The professional title 'mediator' is not, as such, protected in Switzerland.

Several cantons distinguish between authorised mediators, who must fulfil certain requirements (eg, hold a university diploma or equivalent title, have specific training and experience in mediation, be over 30 years of age, have no criminal record relating to offences likely to impair his or her honour) and be sworn in, and non-authorised mediators. The distinction mainly plays a role in relation to legal aid, which is in certain cantons only granted if the mediation is conducted before an authorised mediator.

In addition, there are many training programmes that entitle mediators to carry specific titles upon their completion.

Hence, the Swiss Bar Association (SBA) ([www.sav-fsa.ch](http://www.sav-fsa.ch)) grants the title of Mediator SBA to those of its members who have successfully accomplished a practice-orientated training in the field of mediation and can periodically demonstrate that they are continuing their professional education in that field. Further examples include the title of mediator SCCM, granted by the Swiss Chamber of Commercial Mediation (SCCM) ([www.skwm.ch](http://www.skwm.ch)) or the title of mediator FSM-SDM conferred by the Swiss Federation of Mediation Associations ([www.infomediation.ch](http://www.infomediation.ch)).

Although, in practice, it is mainly qualified professional mediators who act as neutrals in mediation proceedings, the parties are free to choose any third party as mediator. There are indeed no restrictions or requirements as regards the professional background, training or experience of mediators under Swiss law. In particular, no legal background or knowledge of the parties' industry is required.

Mediators from the EU or countries in the European Free Trade Association (EFTA) do not require a permit to provide mediation services in Switzerland provided that such services do not exceed 90 working days per calendar year. Registration with the Swiss authorities is, however, required. If the provision of mediation services in Switzerland exceeds 90 days, a residence permit must be obtained from the cantonal labour market authorities.

Mediators from non-EU or EFTA countries require a work permit to provide mediation services in Switzerland.

The services provided by mediators are subject to value added tax in Switzerland at a rate of 8 per cent if the parties are domiciled in Switzerland, but not if the parties are domiciled abroad.

### Update and trends

The recent case law of the Federal Supreme Court has increased the importance of mediation by declaring it compulsory pursuant to certain multi-tiered dispute resolutions, including in certain FIDIC contracts (see question 20).

It is to be expected that courts and arbitral tribunals will further continue to actively encourage and facilitate the use of mediation as a dispute resolution mechanism in the future.

Private initiatives will also continue to play a role in making the use of mediation more widespread. A two-year pilot project was, for example, launched in mid-2013 by the Swiss farmers' union and the Swiss Chamber for Commercial Mediation, which enables families of Swiss farmers to access mediation services at preferential rates. Another ADR initiative was launched recently by the Geneva Chamber of Commerce of Industry and the GTSA, the main commodity trading association in Switzerland, called 'Alternative Dispute Resolution for Commodity Trading, Shipping and Trade Finance' or ACT, to promote the use of the expedited procedure under the Swiss Rules of International Arbitration and importantly the Swiss Rules of Commercial Mediation for the resolution of commodity trading, shipping and trade finance disputes.

## 24 Training

### Are there any requirements regarding training for mediators?

The only requirements regarding the training for mediators under Swiss law relate to the qualifications of authorised mediators. In some cantons, authorised mediators must be accredited by a recognised Swiss mediation institution (for example the SBA, SCCM or FSM-SDM); in others, it is sufficient for the mediators to establish that they possess specific qualifications to practise mediation and have experience in that field.

Several private and public institutions offer a complete training course in mediation including the Swiss Bar Association or the Groupement Pro Mediation. Advanced studies in the field of mediation are also provided by several Swiss universities and universities of applied arts and sciences.

Subject to a few exceptions, in Switzerland, 200 hours would typically be required for a complete training course in mediation.

The minimum duration of the basic mediation training course required for Swiss Bar Association (SBA) mediators is 120 hours, half of which must be practical training followed by specific courses on the role of lawyers as mediators (minimum eight hours).

To become a certified mediator with the SCCM, at least three years of practical experience after graduation from a university or university of applied arts and sciences as well as 120 hours' training in mediation are required.

## 25 Continued education

### Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

Mediation institutions such as the SBA or the SCCM generally require mediators to undertake continued professional education.

SBA mediators must undertake 16 hours of continued education over three years.

The SCCM applies a credit point system, according to which SCCM mediators must reach a total of 36 points over a three-year period.

## 26 Accreditation of mediators

### Outline the system for certification of mediators.

Some cantons hold a register of authorised mediators (see question 23). Mediation institutions such as the SBA, the SCCM, the FSM-SDM or private organisations hold lists of mediators who are accredited by one of the mediation institutions or who have successfully completed a full mediation training course.

## 27 Mediator liability and sanctions

### What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

Since the agreement between the mediator and the parties is one of simple agency, mediators are under general duties of loyalty and care towards the parties and may be held liable in the event of breach of those duties causing a loss to the parties. There are no sanctions or disciplinary measures, nor regulations on the dismissal of mediators, but the parties are entitled to terminate the mediators' mandate at any time and without cause. There is no compulsory indemnity insurance for mediators.

The Swiss Mediation Rules expressly exclude the mediators' liability 'for any act or omission in connection with any mediation proceedings' (article 25).

## 28 Appointment

### Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

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.

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The Swiss Mediation Rules expressly provide that in the absence of a joint agreement on the mediator, the chambers will submit a shortlist of at least three names to the parties who will designate a mediator from that list. If the parties remain unable to agree on a mediator, the mediator is appointed by the chambers.

Mediators are under a general obligation to disclose any circumstances that affect, or may be perceived as affecting, their independence or constitute a conflict of interests, for example any family or business relationship with one of the parties, financial or other 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.

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## Cases

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### 29 Notable cases

**Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country.**

Given its confidential nature, there are very few publicly known mediation cases in commercial matters, but the enforcement of multi-tiered clauses has been examined by the Federal Supreme Court (see question 20).

## Getting the Deal Through

Acquisition Finance	Dispute Resolution	Licensing	Public-Private Partnerships
Advertising & Marketing	Domains and Domain Names	Life Sciences	Public Procurement
Air Transport	Dominance	Mediation	Real Estate
Anti-Corruption Regulation	e-Commerce	Merger Control	Restructuring & Insolvency
Anti-Money Laundering	Electricity Regulation	Mergers & Acquisitions	Right of Publicity
Arbitration	Enforcement of Foreign Judgments	Mining	Securities Finance
Asset Recovery	Environment	Oil Regulation	Ship Finance
Aviation Finance & Leasing	Foreign Investment Review	Outsourcing	Shipbuilding
Banking Regulation	Franchise	Patents	Shipping
Cartel Regulation	Gas Regulation	Pensions & Retirement Plans	State Aid
Climate Regulation	Government Investigations	Pharmaceutical Antitrust	Tax Controversy
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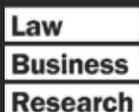
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