

Way to settle a conflict amicably: mediation in Geneva

Switzerland often and successfully acts as a neutral mediator in settlements of international conflicts. However, use of out-of-court procedures is also encouraged for the resolution of civil law disputes between private parties. Priority is given to the peaceful settlement of disputes since the solutions fixed in the form of transaction are more viable and cost efficient as they take into account all circumstances of the conflict and not only its legal and procedural sides.¹

The unified Swiss Code of Civil Procedure (SCCP) has come into force as from January 1, 2011. It incorporates provisions on mediation - an out of court procedure with the involvement of a neutral and independent third party facilitator, for a long time known and regulated in some of the Cantons (in particular, in Geneva as from 2005). Traditionally mediation is used on the fields of family, labor and commercial relationship, but the sphere of its application is constantly growing.

Articles from 213 to 218 and Article 297, Para.2 of the new SCCP deal with mediation. The purpose of these provisions does not consist in regulating the mediation process but to establish its connection with court proceedings. Parties may turn to mediation outside any court proceedings, as replacement of judicial conciliation, in connection with the case examined in the court or in parallel with the hearing of the case in court.

1. Mediation: definition and purposes

SCCP does not give a definition of mediation.

According to definition of the Mediation Directives of Swiss Bar Association adopted in 2005, mediation is an out-of-court procedure of dispute resolution where one or several independent and impartial third parties (mediators) help the parties to a conflict to settle it peacefully through negotiations.

The Swiss Rules of Commercial Mediation adopted by the Swiss Chambers of Commerce and Industry in 2007 define mediation as an alternative method of dispute resolution whereby two or more parties ask a neutral third party, the mediator, to assist them in settling a dispute or in avoiding future conflicts. The mediator facilitates the exchange of opinions between the parties and encourages them to explore solutions that are acceptable to all the participants. Unlike an expert, the mediator does not offer his or her own views, nor does he or she make proposals like a conciliator, and unlike an arbitrator, he or she does not render an award.

Therefore mediation is conducted in order to help the parties to choose their own solution acceptable for all of them and not to be imposed a solution from the outside, as mediators help the parties to restore the constructive dialog.

The basic principles applicable to mediation are (1) voluntary participation in the procedure and possibility to discontinue it at any time; (2) neutrality and independence of the mediator; (3) qualification of the mediator and (4) confidentiality of the procedure and of the representations.

¹ Message of the Federal Council (Government) of Switzerland related to the submission of draft Code of Civil Procedure to the Parliament FF 6860

2. Requirements towards mediators

The mediator shall remain independent and impartial at all times during the mediation procedure. The Parties shall immediately be informed of any circumstance which is likely to affect his or her impartiality. However, with the express consent of the parties, he or she may perform his or her functions.

Some Cantons (Geneva, Fribourg) keep lists of sworn mediators. For instance, pursuant to the law of Canton of Geneva on judiciary organization, a person who has reached the age of 30, is in possession of diploma on higher education, enjoys good professional experience, has sufficient knowledge and skills in the field of conducting mediation and shows clean records with respect to offences and criminal behaviors affecting decency and honor, may apply to become sworn mediator. The selected candidate shall then take an oath before the State Council – the executive authority of the Canton. In turn, the State Council includes the data and areas of specialization of such mediator into the appropriate lists covering mediators on criminal matters, on one side, and mediators and organizations acting in civil and commercial mediation, on the other side.

3. SCCP on civil mediation

The mediation procedure may be suggested to the parties as an alternative to conciliation or as a procedure within the framework of the case pending with the court of the first or the second instance. Judges may at any time recommend to the parties to make use of mediation proceedings.

4. Mediation in replacement of the conciliation

It is the general rule that the case can be filed with the court only after the attempt of conciliation. Conciliation is conducted by the designated independent, neutral and impartial judge; who, unlike a mediator, may suggest a solution to the parties in case they do not achieve it themselves. Upon the request of all parties conciliation may be replaced by mediation.

5. Duration of mediation

Conciliation may not last for more than 12 months. The law does neither specify whether this time-limit applies to mediation, nor, should it be applicable, regulates the consequences of the missed dead-line. This issue should not arise in practice since mediation is an expedite procedure.

6. Mediation when the case is pending

Parties may recur to mediation when the case is already pending, or request for mediation after the mandatory conciliation has failed or when the attempt of conciliation did not take place when it deals with the areas where such attempt is optional or is not allowed by the law.

The court proceedings are suspended for the period of mediation. Since mediation is voluntary, it can be discontinued at any time, in such case the proceedings shall continue.

7. Organization and conduct of mediation.

The parties are in charge with organization and conduct of mediation. The court shall provide the necessary information in this respect. The parties shall agree on the designation of a mediator and shall enter into an agreement on the conduct of the mediation, i.e. the place of mediation, its schedule, costs distribution as well as other organizational issues.

8. Mediation and court proceedings: confidential and independent procedure

Mediation is confidential and completely independent of both the conciliation judge and the court, who cannot give any instructions. Thus, mediation is totally independent from the court proceedings irrespective of the fact whether it was started on the stage of conciliation or during the proceedings. The person who acts as mediator in one case may not further act in the same case in any other function. In addition, the mediator can not be called as a witness within the framework of the proceedings as, doing so, he or she would have to disclose the circumstances which have come to his knowledge during the performance of the mediation..

SCCP expressly guarantees the confidentiality of the procedure. Mediator as well as the parties are bound with confidentiality. Representations of the parties as well as any information and documents disclosed during the mediation process cannot be taken into account during any further proceedings in court or before an arbitral tribunal.

SCCP does not regulate the relationship between mediation and arbitration proceedings. It is assumed that mediation is possible within the framework or arbitration proceedings as well and that SCCP's provisions on mediation shall apply by analogy. Most of the institutional rules on arbitration provide for the possibility to use mediation before or in parallel to arbitration proceedings (See Swiss Rules on Arbitration).

In any event, parties may include in their contract a combined step clause providing for mandatory mediation prior to arbitration or to court proceedings.

9. Termination of mediation without agreement of the parties

If the mediation proceedings did not result in an overall agreement of the parties, the proceedings at court may be started (the conciliation body shall authorize to introduce the proceedings) or shall continue (if already started).

10. Mediation Agreement. Approval of Mediation Agreement

An agreement concluded by the parties as a result of mediation (Mediation Agreement) is a civil law contract. If the parties have reached an agreement, they may apply for its approval by the conciliation body or by the court provided that the agreement complies with public order and mandatory rules of law. The written form is required if the Mediation Agreement shall be submitted to a court for approval or notarized as Authentic Document. The Authentic Document is an executive document valid in Switzerland as well as in the States-members of Lugano Convention². Mediation Agreements approved by the court have the force of *res iudicata*.

The Agreement resulting from mediation held in connection with international arbitration proceedings can be recorded in the form of an arbitral award on agreed terms. Such an award

² These are EU member States, Switzerland, Norway and Island.

can be enforced abroad on the basis of the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards³.

Conclusion

Mediation is a quick and efficient dispute resolution method, inexpensive in comparison with court and arbitration proceedings. It allows the parties to settle their conflict to their mutual satisfaction with the assistance of an independent third party, and to preserve their relationship for the long-term prospective. Practice shows that use of mediation in resolution of commercial conflicts between the representatives of different countries and cultures brings very good results (the statistics worldwide usually show a positive result of almost 80%).

The Canton of Geneva has introduced provisions on mediation in its legislation long before the civil proceedings were unified at the federal level and regulates this conflict resolution procedure in more details than any other Cantons. As from 2005 rules on civil mediation and on the requirements towards mediators have been introduced into the legislative and regulatory body of the Canton and its new Law on the organisation of the judiciary system, adapted to the federal Code of Civil Proceedings, has come into force simultaneously on 1 January 2011.⁴

The new Federal Code of Civil Proceedings and the legislation of the Canton of Geneva ensure a stable legal base for the performance of mediation proceedings in an environment most favourable for the settlement of conflicts; the entry of specialists in the field of conflict resolution into the list of sworn mediators, as well as their accreditation with professional bodies (e.g. Swiss Chamber of Commercial Mediation, www.skwm.ch). It constitutes a warranty of the excellent qualification of mediators and of their compliance with higher ethical standards.

By introducing a mediation clause (or a step clause providing for mediation followed by judicial proceedings or arbitration) in their contracts, the parties may submit their future conflicts to the mediation procedure under rules worked out by reputed organisations such as the Swiss Chambers of Commerce and Industry (www.swisschambermediation.ch) .

³ The New-York convention is ratified by 146 countries, see the status of the Convention on http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

⁴ Text of the Law is available on the official site of Canton Geneva http://www.ge.ch/legislation/rsg/f/rsg_e2_05.html