

Arbitration - Switzerland

A Suitable Forum for Med-Arb

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Mediation success rates typically exceed 70% and may reach 80% or more. Arbitration clauses increasingly require mediation to be conducted as a preliminary step before arbitration. 'Med-arb' clauses (which provide that the mediation process will give way to arbitration should the parties fail to agree) are increasingly common and will probably become generalized.

If nearly all disputes were to be subject to preliminary mediation, the number of arbitration cases might be substantially reduced. However, it would remain to be seen whether the success rate for mediation would stay as high if nearly all arbitration cases first went to mediation, including those which are arguably harder to mediate. In any case, the present trend means that arbitration experts must deal not only with arbitration law, but also with med-arb law.

Switzerland's tradition of mediating arbitration cases is reflected in its statutes, court decisions and practice. The established nature of the practice is evidenced by the relatively large number of arbitrators and counsel who have dual skills as a result of the tradition of conciliating or mediating in court cases. One example that has influenced Swiss lawyers is the highly successful report hearing, in which the Zurich Commercial Court expresses a preliminary view after a first set of submissions so that the parties, guided by this view, can decide to settle the case (if the view appears sound) or to pursue it (if it appears likely that the court's preliminary view might be changed by the submission of more information).

As to statute, the draft federal Act on Civil Procedure contains provisions on mediation. This federal act will replace cantonal codes of civil procedure which already provide for mandatory conciliation proceedings before a case may be brought to court. The main Swiss chambers of commerce have issued a common set of mediation rules, which can be combined with their arbitration rules.⁽¹⁾

Med-arb law still needs development, such as on questions of independence, waiver and due process where the same person is acting as mediator and arbitrator. However, the Supreme Court's practice is generally to make up for the scarcity of its decisions on international arbitral awards (typically 12 to 15 a year) by including ample *obiter dicta* (ie, remarks in passing) whenever an opportunity arises to clarify the law.

The court will probably follow its usual practical approach to solving international arbitration issues. In particular, the court is likely to be broad-minded about challenges against arbitrators based on their prior involvement with the issues, as it has already clarified that an arbitrator ceases to be sufficiently independent only if he or she has stated a clear and irrevocable view on the legal consequences of the facts of the particular situation.

On the question of enforcing med-arb clauses, there seems to be little doubt that the court will enforce med-arb clauses strictly as agreed (for further details please see "[Supreme Court Clarifies Pre-arbitration Conciliation Requirement](#)"). Generally, when faced with agreed pre-arbitration time limits or conditions, the court has enforced them strictly according to the parties' intent. Therefore, the onus is on those drafting arbitration clauses: if they wish to include mandatory mediation before arbitration, they should state this clearly. Providing a time limit for mediation before arbitration may be commenced is helpful in this regard.

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Endnotes

(1) The mediation and arbitration rules can be found at <https://www.sccam.org/sm/en/index.php> and <http://www.swissarbitration.ch/> respectively.

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