

HOW TO MASTER MEDIATION

CONTRIBUTION TO CHAPTER 5 – ONE CONTINENT, MANY METHODS

COUNTRY: SWITZERLAND

By Jeremy LACK (Attorney-at-Law & ADR Neutral)

I. OUTLINE OF CIVIL & COMMERCIAL MEDIATION IN SWITZERLAND

Switzerland is a country with a rich tradition of mediation and neutrality, going back to its patron saint, Nicolas de Flue, who mediated a peace agreement at the Diet of Stans in 1481 between warring states, enabling the states of Fribourg and Soleure to join the Swiss Confederation. It has been a preferred venue for hosting international arbitrations for over 100 years, both institutional and ad-hoc. Today, Switzerland consists of 26 cantons, each of which had its own rules of civil procedure until as recently as January 1, 2011, when a new *Swiss Code of Civil Procedure* (the “**CPC**”) came into effect and recognised mediation as a form of judicial proceedings at a national level in most civil and commercial cases.¹ Switzerland is also widely recognized as a neutral country in international public affairs. The presence of the United Nations, the International Committee of the Red Cross, and many international governmental and non-governmental organisations in the canton of Geneva have contributed to an international vision of Switzerland as a centre for peaceful and amicable dispute resolution, including arbitration, conciliation and mediation. In the international commercial sector, Switzerland is well-known for its adherence to principles of private international law, confidentiality, neutrality and respect for privity of contract. The Swiss Chambers Arbitration Institution, a body set up by the Swiss Chambers of Commerce Association for Arbitration and Mediation (consisting of the cantonal chambers of commerce of Basel, Bern, Geneva, Neuchâtel, Ticino (Lugano), Vaud (Lausanne) and Zurich), administers a modern and widely-used international set of dispute resolution rules, the *Swiss Rules of International Arbitration* (the “**SRIA**”)²

¹ This paper focuses primarily on civil and commercial mediation in Switzerland. For a more detailed analysis of mediation, comparing it to other countries, see *The Variegated Landscape of Mediation: A Comparative Study of Mediation Regulation and Practices in Europe and the World*, M. Schonewille & F. Schonewille (eds.), Eleven Publishing, (2014). For an official translation of the Swiss Code of Civil Procedure in English, see: <http://www.admin.ch/ch/e/rs/272/index.html>.

² Updated in June 2012. See: https://www.swissarbitration.org/sa/download/SRIA_english_2012.pdf.

and the *Swiss Rules of Commercial Mediation* (the "**SRCM**"³, jointly referred to as the "**Swiss ADR Rules**"), which provide links between mediation and arbitration.⁴ Furthermore, the World Intellectual Property Organisation ("**WIPO**"), a United-Nations agency, offers and administers a broad range of international ADR services, including arbitration, mediation and expert determination. Although its remit relates primarily to cross-border intellectual property disputes, WIPO's ADR rules can be used for any type of commercial dispute and have been approved by its 187 member states.⁵ In the field of international sports, the Court of Arbitration for Sports ("**CAS/TAS**") based in Lausanne likewise offers both mediation and arbitration services, and has expressed a growing interest in the use of mediation (as is also the case for the International Olympic Committee, also located in Lausanne). Many other international ADR organizations, such as the World Trade Organisation ("**WTO**"), the International Chamber of Commerce ("**ICC**"), and the International Centre for Dispute Resolution ("**ICDR**") offer ADR proceedings in Switzerland, with Geneva and Zurich ranking consistently among the most popular venues for international ADR proceedings. Finally, **GTSA**, the main international commodity trading association in Switzerland, has also recently created a new dispute resolution service with the Geneva Chamber of Commerce and Industry -- Alternative Dispute Resolution for Commodity Trading, Shipping and Trade Finance ("**ACT**"), which offers mediation and arbitration services.⁶

At a domestic level, Switzerland has four leading associations that provide mediation services and lists of certified mediators for civil and commercial mediations. They are: (i) the Swiss Chamber of Commercial Mediation ("**CSMC/SKWM/SCCM**"), which is the leading organisation in commercial mediation;⁷ (ii) the Swiss Federation of Mediation Associations ("**FSM/SDM**");⁸ (iii) the Swiss Association for Mediation ("**SVM/ASM**");⁹ and (iv) the Swiss Bar Association, which certifies Swiss lawyers as mediators

³ Last printed in 2013. See https://www.swissarbitration.org/sm/download/swiss_mediation_rules.pdf.

⁴ For a summary on the links provided between mediation and arbitration under the Swiss ADR Rules, see J. Lack, *The New Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry: Possible Links to Arbitration*, Müller/Rigozzi (eds.) *New Developments in International Commercial Arbitration 2008*, Schulthess Editions Romandes 2008, pp. 105-24 (Nov 2008), available via the Internet at http://www.mediate.com/mediator/attachments/28823/jl_2008_Swiss_Rules_Commercial_Mediation.pdf.

⁵ For a list of WIPO's member states, see: <http://www.wipo.int/members/en/>. For a list of the procedures offered by WIPO's Arbitration and Mediation Center, see: <http://www.wipo.int/amc/en/center/wipo-adr.html>.

⁶ See <http://www.gtsa.ch/dispute-resolution/act>.

⁷ <http://www.skwm.ch/>.

⁸ <http://www.infomediation.ch/cms/>.

⁹ <http://www.mediation-svm.ch/>

("SAV/FSA").¹⁰ Each of these bodies has developed its own set of specialities, accreditation rules and continuing professional development requirements, which set varying best practices, standards and codes of conduct around the country. Some cantons (e.g., Fribourg Geneva and Vaud) also provide a local cantonal registry of certified mediators, who have to swear an oath of office and are accountable to a local supervisory court or commission.¹¹ The leading association for commercial mediations is CSMC/SKWM/SCCM, which has regional branches in Central Switzerland, Western Switzerland (Suisse Romande), Bern, Ticino and Zurich and cooperates closely with the Swiss chambers of commerce in promoting and implementing the Swiss ADR Rules.

All in all, Switzerland continues to be an active player in the field of civil and commercial mediation, both domestically and internationally.

II. THE CURENT LEGAL STATUS OF MEDIATION IN SWITZERLAND

At an international level, Switzerland's private and public international laws are highly prized in international commercial dispute resolution circles, leading to the choice of Geneva, Zurich or Lausanne for many international commercial disputes, including for investor-state disputes under the rules of the International Centre for Settlement of Investment Disputes (ICSID). The country's ADR institutions also use updated state of the art rules, which are all compatible with the latest United Nations Commission on International Trade Law (UNCITRAL) arbitration and conciliation rules.

At a domestic level, the CPC came into effect on January 1, 2011, harmonizing the various disparate cantonal approaches to civil and commercial mediation that existed until then. The CPC recognises and distinguishes between three dispute resolution procedures as an alternative to adjudication by a national court. They are: (i) arbitration, (ii) conciliation and (iii) mediation. Arbitration is a binding and evaluative ADR process that is dealt with separately under Part 3 of the CPC, and falls outside the scope of this chapter.¹² Conciliation and mediation, however, are arguably both

¹⁰ <http://www.mediation.sav-fsa.ch/>

¹¹ See e.g., Title IX of the Geneva law of September 26, 2010 on the organization of the judiciary (the "LOJ"), Arts. 66-75 LOJ at http://www.ge.ch/legislation/rsg/f/rsg_e2_05.html.

¹² For arbitration under the CPC, see Arts. 353-99 at <http://www.admin.ch/ch/e/rs/272/index.html#id-ni74>.

forms of "mediation" as defined by Article 3 of EU Directive No. 2008/52/EC on civil and commercial mediation (the "**EU Directive**").¹³ They are dealt with together under Part 2 of the CPC and have been referred to as (non-identical) twin sisters.¹⁴ The distinction between conciliation and mediation is difficult to grasp, as in many languages and countries the two terms are used synonymously. The CPC itself does not clearly distinguish between them either. Both procedures, however, fall within the definition of "mediation" at Art. 3 of the EU Directive insofar as they involve a process "*whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a [neutral third party]*". The primary difference between these two processes, is who the "neutral third party" will be, and related consequences as described below.

Conciliation is covered by "Title I: Attempt at Conciliation" under Arts. 197-212 CPC.¹⁵ The "conciliation authority" consists of one or more magistrates who are not seized of the final decision in the matter.¹⁶ The goal of the conciliation authority is defined as

¹³ DIRECTIVE 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Article 3 reads as follows: "**Definitions.** For the purposes of this Directive the following definitions shall apply: (a) '**Mediation**' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question. (b) '**Mediator**' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation." This interpretation of conciliation as being a form of "mediation" depends on whether conciliation proceedings are viewed as "judicial proceedings" where a "judge" is viewed as the person "seized to settle the dispute". If this relates to matters of procedure, conciliation probably does not count as "mediation" as it is a "judicial procedure" under Swiss law (whereas mediation is extra-judicial). If, however, the gist of Art. 3 was only to exclude mediation where the judge would be responsible for hearing and deciding the same matter when sitting as a judge, then conciliation could be perceived as being form of mediation pursuant to Art. 3 of the Directive, since the conciliator/conciliation authority will not be making any decisions on substantive issues, and will not be resolving the matter.

¹⁴ Jean A. Mirimanoff, « *La médiation: de la mythologie à la réalité* » November 26, 2011, available on the website of the Swiss Chapter of the Group of European Magistrates for Mediation ("GEMME") at http://www.gemme.ch/rep_fichier/2011_Paris_Mythologie.pdf.

¹⁵ <http://www.admin.ch/ch/e/rs/272/index.html#id-ni34-ni35>.

¹⁶ Recital 12 to the EU Directive specifically states: "*This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, in so far as a judge may act as a mediator under national law, this Directive should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute.*" In property and gender discrimination cases, according to Art. 200 CPC, "*the conciliation authority shall comprise a chairperson and an equal number of representatives of each of the parties.*" See the discussion at footnote 13 above on whether conciliation is a form of "judicial proceedings" where the judge is "responsible" for resolving the matter.

follows: “*The conciliation authority shall attempt to reconcile the parties in an informal manner. If it helps to resolve the dispute, a settlement may also include contentious matters that are not part of the proceedings.*”¹⁷ In disputes relating to property leases and gender discrimination, the conciliation authority consists of several magistrates who are likely to provide legal advice and their opinions to the parties.¹⁸ Conciliation proceedings are a compulsory prior step in most civil and commercial legal proceedings. In principle, a case will not be heard by a tribunal before an attempt to conciliate has first occurred.¹⁹ There are many exceptions to this principle, however, and a prior obligation to conciliate may also be waived in some instances.²⁰ Given the fact that the conciliator is a magistrate (who may or may not have had mediation training), a conciliation tends to be a non-binding evaluative process that seldom lasts for more than one hour, although subsequent sessions may be agreed to.²¹ The parties must appear in person at the conciliation hearing and need not be accompanied by a lawyer.²² The proceedings are not public and the parties’ statements may not be recorded or used in subsequent court proceedings.²³ The conciliation authority will normally use the law as a basis to assist the parties in trying to reach an amicable agreement based on an application of a legal syllogism, whereby the outcome is based on the findings of fact and law that a tribunal is likely to make. In certain cases the conciliation authority can give a proposed judgment (which can be rejected)²⁴, or it can even issue a binding decision in certain small claims cases.²⁵ Although the parties’ statements to the conciliation authority are confidential, a proposed judgment or decision (if one is given) may be subsequently used.²⁶ If an agreement is reached pursuant to a conciliation, the terms of the settlement are recorded by the conciliation authority and the record of settlement has the effect of a binding court decision.²⁷ It is normal (and even expected) for a conciliator to provide

¹⁷ Art. 201 CPC (“Tasks of the conciliation authority”) at <http://www.admin.ch/ch/e/rs/272/a201.html>.

¹⁸ Art. 201 al. 2 CPC.

¹⁹ Art. 197 CPC reads “Art. 197 (Principle): Litigation shall be preceded by an attempt at conciliation before a conciliation authority.” There is a long list of exceptions to this principle, however, listed in Art. 198 CPC.

²⁰ Arts. 198 & 199 CPC.

²¹ Art. 203 CPC. See <http://www.admin.ch/ch/e/rs/272/a203.html>.

²² Art. 2014, al 1-2 CPC. See <http://www.admin.ch/ch/e/rs/272/a204.html>.

²³ Art 203 al. 3 CPC and Art. 205 al. 1 CPC.

²⁴ Arts. 210-11 CPC. See <http://www.admin.ch/ch/e/rs/272/a210.html>.

²⁵ Art, 212 CPC <http://www.admin.ch/ch/e/rs/272/a212.html>.

²⁶ See Art. 210 CPC and Art. 205 al. 2 CPC.

²⁷ Art. 208 CPC. See <http://www.admin.ch/ch/e/rs/272/a208.html>.

a non-binding opinion and to help the parties to understand what the dispositive issues of the case are likely to be, and who will have the burden of proving what. Although caucusing is not mentioned in the CPC, and is arguably not expressly forbidden, it is unlikely that a conciliation authority would ever consent to meet with one of the parties in private, as it would likely be deemed to be in violation of the *audi alteram partem* rule whereby the other party should always have the right to be present to contest what is presented to a judge, even if the purpose of the caucus would be to do reality testing that would be helpful to the absent party.²⁸ As a result, a conciliation is not quite equivalent to an evaluative mediation process, although there are clear similarities between these two types of proceedings.

Mediation is covered by "Title II: Mediation" under Arts. 213-18 CPC.²⁹ It is the "poor" twin sister to conciliation to the extent that there are only 6 articles in the CPC relating to mediation, and the process is only available if the parties request it as an alternative to a conciliation procedure.³⁰ That being said, this may also be viewed as a positive thing, giving more strength and flexibility to parties wishing to organise their own private form of mediation, with any mediator of their choice. The court itself may recommend mediation to the parties at any time, or even summon them in family matters involving children,³¹ and the parties may also make a joint request for mediation at any time.³² Unlike conciliation, where the conciliation authority summons the parties and is responsible for organising and conducting a conciliation, the parties are responsible for organising and conducting their own mediation proceedings as they wish.³³ As in conciliation, mediation proceedings are confidential and are kept separate both from the conciliation authority and the court. The statements of the parties may not be used in court proceedings.³⁴ If a settlement agreement has been reached through such a mediation process, the parties may request that it be approved by the court, in which case the approved agreement will have the same effect as a legally binding decision by the court.³⁵ Finally, unlike conciliation, where the costs are

²⁸ Art. 53 al. 1 CPC provides that the parties have a right to be heard, which may be interpreted as prohibiting caucuses in conciliation. See <http://www.admin.ch/ch/e/rs/272/a53.html>.

²⁹ <http://www.admin.ch/ch/e/rs/272/index.html#id-ni34-ni40>.

³⁰ Art. 213 CPC. See <http://www.admin.ch/ch/e/rs/272/a213.html>.

³¹ Art. 297 al. 2 CPC. See <http://www.admin.ch/ch/e/rs/272/a297.html>.

³² Art. 214 CPC. See <http://www.admin.ch/ch/e/rs/272/a214.html>.

³³ Art 215 CPC. See <http://www.admin.ch/ch/e/rs/272/a215.html>.

³⁴ Art. 216 CPC. See <http://www.admin.ch/ch/e/rs/272/a216.html>.

³⁵ Art. 217 CPC. See <http://www.admin.ch/ch/e/rs/272/a217.html>.

included in the courts fees, the parties bear themselves the costs of any mediation proceedings they may agree to.³⁶ The aforementioned provisions relate to court-related mediations. If a mediation is initiated outside of court proceedings altogether (i.e., without any conciliation proceedings or a court action having already commenced), the provisions of Title II do not apply, and the mediation is not automatically protected by operation of the CPC. It will be subject to any specific contractual or local cantonal provisions that may apply.³⁷ A settlement agreement that is reached by a mediation outside of court proceedings may still become legally enforceable if it is ratified by the court having personal and subject-matter over the dispute, or if it is converted into an Official Record (in French a "*Titre authentique*" and in German an "*Öffentliche Urkunde*") under Part. 2, Title 10, Chapter 2 of the CPC (Arts. 347-52), by having it notarized before a public notary.³⁸ An Official Record is, however, subject to judicial review if there is an objection to its execution.³⁹ A mediation (whether pursuant to court proceedings or private) can be run in any way that the parties deem fit. (See Section IV below).

Although the distinction between mediation and conciliation is thus somewhat unclear, the Federal Council, when publishing the first draft of the CPC, defined mediation in an official communication dated June 28, 2006 as follows: Swiss ADR Rules provide some clarification by defining mediation as follows: "*Mediation is an extrajudicial process. It is essentially characterized by the intervention of a neutral and independent third person. In this way, it resembles classical conciliation. However, whereas an attempt at conciliation is based on an informal negotiation, mediation follows a more formal structure. Unlike the authority of conciliation, the parties find themselves in a horizontal relationship with the mediator. Thus, this person does not have any decision-making powers, which also distinguishes mediation from arbitration.*"⁴⁰

³⁶ Art. 218 CPC. See <http://www.admin.ch/ch/e/rs/272/a218.html>.

³⁷ The canton of Geneva, for example, has passed cantonal legislation, the LOJ (see footnote 11 above), which provides that mediators operating in the canton must be independent, neutral and impartial (Art. 70 LOJ), that they are bound by obligations of professional secrecy (Art. 71.1 LOJ) and that regardless of whether a mediation settles or not, the parties may not disclose anything that was stated in the presence of the mediator (Art. 71.3 LOJ).

³⁸ See <http://www.admin.ch/ch/e/rs/272/index.html#id-ni34-ni71-ni73>.

³⁹ Art. 352 CPC. See <http://www.admin.ch/ch/e/rs/272/a352.html>.

⁴⁰ See <http://www.admin.ch/opc/fr/federal-gazette/2006/6841.pdf>, §5.14 at page 6943.

The Swiss Chambers Arbitration Institution of the Swiss chambers of commerce distinguish mediation from other ADR proceedings as follows: "*Mediation is 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 make proposals like a conciliator, and unlike an arbitrator he or she does not render an award.*"⁴¹

The major unspoken differences between mediation and conciliation, however, are:

- a typical mediation session will last at least several hours, if not several half days or full days;
- a mediator is unlikely to rely only on norms or a legal syllogism to shape or propose a solution;
- a mediator will often meet with the parties separately and use caucuses or pre-caucuses not to do reality testing (although this is possible) but to coach the parties as to what they could do in joint sessions; and
- a mediator will usually work with the parties to first help them to identify their subjective interests looking to the future (as opposed to their positions), and to generate options based on these interests that could result in long-lasting and viable settlements that will address the parties' interests, rather than seek a compromise between conflicting positions.

III. THE EXTENT & USE OF MEDIATION IN SWITZERLAND

Given that the CPC is still relatively new in Switzerland and that all mediation proceedings are confidential, there are limited statistics on the use of mediation, or on the use of mediation as opposed to conciliation in Switzerland. To the extent that mediation and conciliation are both enshrined in the CPC and that Switzerland is routinely listed as a venue for international ADR proceedings, the use of mediation (in its broadest EU Directive sense) is quite prevalent and continues to grow. As is the

⁴¹ See: https://www.swissarbitration.org/sm/download/swiss_mediation_rules.pdf.

case in many other countries, Swiss ADR institutions report a settlement rate of 70-80% for mediation, although a lower settlement rate for conciliation, which varies from canton-to-canton depending on the training that the conciliation authorities will have received. Conciliation is practised in the majority of commercial and civil cases that are pending before the courts. It is believed that extra-judicial mediation (as opposed to conciliation), whether ad-hoc or using private institutional rules is still the exception rather than the norm. Its use has been growing in the last few years, however, and lawyers and arbitrators are beginning to take a growing interest in this form of ADR process, including mediation clauses in an increasing number of agreements.

At a cantonal level, mediation (as opposed to conciliation) is also being increasingly discussed and promoted. Argovie, Fribourg, Geneva, Glaris, Grison, Jura, Neuchatel, St. Gallen, Tessin, Valais, Vaud and Zurich, have all passed supplementary cantonal legislation promoting the use of mediation in civil, criminal and/or administrative disputes. Since 2011, cantonal courts are also increasingly encouraging the use of mediation in family and juvenile courts. As a further sign of the continuing growth of mediation at a local level in Switzerland, the canton of Geneva (which was one of the first to adopt a cantonal law on civil mediation),⁴² adopted a new Constitution by popular referendum on October 14 2012,⁴³ which contains three mediation provisions: (a) the primary means for resolving labour union disputes in the canton in the future will be negotiation and mediation;⁴⁴ (b) a new independent mediation body will be appointed to handle all administrative disputes;⁴⁵ and (c) the judiciary and the state must both encourage the use of mediation and other modes of dispute resolution in the future.⁴⁶ Several cantonal universities (e.g., Geneva, Lausanne, Neuchatel) are also beginning to teach mediation and mediation advocacy. The Neuchatel chapter of the Swiss Academy of Magistrates is teaching mediation to judges, and the Geneva Bar has recently created a vocational advocacy program for trainees (ECAV), which contains a compulsory 10 hour module on mediation and mediation advocacy for anyone wishing to become a lawyer. From all of these recent initiatives, it appears

⁴² Law No. 8931 of October 28, 2004 modifying the law on Civil procedure (E 3 05) ("Civil Mediation"), which has now been replaced by the federal CPC and the Geneva LOJ of September 26, 2010.

⁴³ See http://www.ge.ch/constituante/doc/Projet_de_constitution_version_finale_190612_A4.pdf.

⁴⁴ Article 36 al. 4 of the new Geneva Constitution.

⁴⁵ Article 115 of the new Geneva Constitution.

⁴⁶ Article 120 of the new Geneva Constitution.

that the use of mediation in Switzerland is likely to continue to grow at a cantonal and federal level in the coming years.

IV. COMMON STYLES OF MEDIATION

Given the variety of cantonal approaches that used to exist with respect to conciliation, and the fact that Switzerland is heavily influenced by its neighbouring countries (i.e., France, Germany, Italy, and Austria) as well as the Swiss tendency to look at other leading jurisdictions in new fields (e.g., the Netherlands, Australia, Canada, the USA, England and Scotland, when it comes to mediation), it is difficult to speak of one "common style" of mediation. There is already confusion between conciliation (which is similar to, but not the same as, evaluative mediation), and mediation. All of the Swiss certifying bodies have strict Continuing Professional Development requirements, and over the course of time, most Swiss mediators will have been exposed to many different types of mediation, ranging from facilitative to evaluative, transformative, spiritual, appreciative, solution-focused, constellation-based, systemic-oriented, caucus-based, non-caucus based, etc. Mediations can be *ad-hoc* or institutional (e.g., using the Swiss Mediation Rules, WIPO, ICC, ICDR, ACT, etc.). Even then, most mediation rules leave the mediator and the parties to their own devices. The parties are free to appoint whomever they wish as their mediator, and it is possible for the parties to appoint a person without any mediation or legal training, unless there are additional local cantonal laws regulating who may act as a mediator. This variation in styles is also due to the fact that many Swiss mediators are also used to acting as conciliators and/or as arbitrators, and make a clear distinction between these three forms of ADR. The use of co-mediation and hybrid processes (combining the use of different ADR processes sequentially, in parallel or as part of integrated proceedings, together with mediation) is common in Switzerland, and it is not uncommon for an arbitral tribunal to swap hats and act as a conciliation authority (albeit without caucuses), although not as a mediator. Switzerland has been and continues to be a crossroads where many forms of mediation meet and mix, and where mediators are encouraged to adapt the style of mediation to each case, following a discussion with the parties about their procedural options and preferences, treating the process itself as part of the problem to be jointly solved by the parties, understanding the impact that process can have on the outcomes, and the tendency

of conflicts to escalate if the process is not designed to have anti-escalation measures.⁴⁷

About the Author:

Jeremy Lack is an independent lawyer, mediator and arbitrator, based in Geneva, Switzerland. He is admitted to the bars of England & Wales, New York, the United States Patent and Trademark Office, and the Geneva Bar (where he serves on the Committee for the Section of Lawyers from Foreign Bars), is a Door Tenant with Quadrant Chambers in London, and Of Counsel to Charles Russell LLP in Geneva and London.⁴⁷ He is the Co-Chair of the Swiss Chamber of Commercial Mediation (Section Romande) and the Vice-Chair of the Independent Standards Commission of the International Mediation Institute (IMI), and a member of its taskforces on cross-cultural mediation, investor-state disputes, mediation advocacy, ADR Hybrids, and IMI's Qualified Assessment Programs and QAP Audit Committee. He is also a certified mediator and mediation advocate, is the advisor to the Geneva Chamber of Commerce and Industry on mediation, and sits on the Oversight Commission on Civil and Criminal Mediation created by the Republic and Canton of Geneva. The author is grateful to Me Birgit Sambeth Glasner, Me Alexis Lafranchi, Me James Peter and Mr. Dieter Steudel for their comments when reviewing this article. For further information, please contact jlack@lawtech.ch.

⁴⁷ For more information about process design and some of these hybrid models, see J. Lack, *Appropriate Dispute Resolution (ADR): The Spectrum of Hybrid Techniques Available to the Parties*, Chapter 17, [ADR in Business, Practice and Issues Across Countries And Cultures](http://www.imimmediation.org/cache/downloads/x8bxnjg4d6owcs84kgcs44g4/adr-the-spectrum-of-hybrid-techniques-available-to-the-parties--by-jeremy-lack.pdf) (Kluwer Law International, edited by A. Ingen-Housz, 2011), pp. 339-79, available via the website of the International Mediation Institute (IMI) at <http://www.imimmediation.org/cache/downloads/x8bxnjg4d6owcs84kgcs44g4/adr-the-spectrum-of-hybrid-techniques-available-to-the-parties--by-jeremy-lack.pdf>.