

The New Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry: Possible Links to Arbitration

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I. Introduction: ADR In Switzerland

Switzerland has a proud reputation in the field of international conflict prevention and resolution. From the time of the Alabama arbitration in 1871 to the present, it has established itself as a leading jurisdiction in the field of international arbitration, and it has enacted one of the most comprehensive and modern laws of international arbitration in effect today, which is set out in Chapter 12 PILS of 1987. In addition to arbitration, however, Switzerland is re-discovering one of its other traditions: mediation. Although it is already known in international diplomatic and humanitarian circles as a country of mediators, Switzerland and the commercial world have tended to forget about its roots and skill sets in civil and commercial mediation, as a way of preventing and resolving domestic as well as international commercial disputes, which go back to the middleages¹. This is all beginning to change, as demonstrated by two recent examples: (a) new provisions in the Swiss Federal Code of Civil Procedure (to be enacted in 2011) that will endorse civil mediation for the first time in Switzerland as a judicially-recognised means of dispute resolution; and (b) a recent move by the Swiss Chambers of Commerce and Industry (the «Chambers») to promote commercial mediation in addition to arbitration.

This paper will examine the links between mediation and arbitration and how the Chambers' new Rules of International Arbitration («Swiss Arbitration Rules» or «SAR») of January 2006 and their even newer Rules of Commercial Mediation («Swiss Mediation Rules» or «SMR») of April 2007 (collectively, the «Swiss ADR Rules») provide for a new paradigm in dispute resolution mechanisms, by combining the best of both worlds: the business certainty and norms-based tradition that arbitration has to offer, with the subjective and future interests-based approach that mediation has to offer.

Prior to discussing these links, however, it is important to make a distinction between three types of dispute resolution that are common in Switzerland, and are sometimes grouped together under the heading of Alternative Dispute Resolution («ADR»). These are (i) arbitration, (ii) conciliation, and (iii) mediation, which can be distinguished from one another as follows:

¹ GLÄBER/VON SINNER, pp. 64-68.

- **Arbitration** is an adjudicative process, in which the neutral is evaluative, and decides both procedural and substantive issues. Although arbitration is more flexible in many ways than litigation in national courts, it is a norms-based system wherein the arbitration tribunal is constrained to some extent. The tribunal is expected to limit itself to looking only at issues of fact, which have occurred in the past, and at issues of law, dismissing extraneous information such as the parties' needs, wants or feelings as irrelevant. The tribunal has a «sacred duty» to apply a norms-based legal syllogism whereby «facts + law = outcome» (or «conclusions» in French). Arbitrators have the onerous responsibility of getting their outcomes «right», as an arbitral award is usually non-appealable and internationally enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
- **Conciliation** is an evaluative but non-adjudicative norms-based process, in which the neutral tends to decide on procedural issues, and can make non-binding proposals as to substantive issues. The parties are encouraged to reach an agreement based on proposals formulated by a conciliator in view of doctrine, the law and jurisprudence, which are objective and «legal rights-based». Conciliation is thus an evaluative process, like arbitration, which also seeks to apply the legal syllogism, and is typically backward looking, as it seeks outcomes based on norms and on what would likely happen in an adjudicatory context. It is for this reason that many arbitrators are comfortable with and practice conciliation in the course of arbitration, and have been doing so for many years, sometimes prompting the parties to settle within a zone of possible agreement («ZOPA») that is based on what the law would provide for, before issuing an award.
- **Mediation** is a non-adjudicative process, which is meant to be based on subjective interests, not on objective norms, and where options can be generated that go beyond the range of relief that is available to an arbitrator or that would normally be contemplated in conciliation. It has been defined as «*[t]he process by which the participants, with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives and reach a consensual agreement that will*

accommodate their needs»². The parties are encouraged in this process to explore solutions that are oriented towards the future and not just the past. Although the past remains relevant, and the parties' legal rights remain relevant to assess their Best Alternative to a Negotiated Agreement (their «BATNA»), the mediator is free to explore with the parties their subjective interests, wants and needs, and the reasons behind their legal positions. A mediator will usually focus on issues that a tribunal would normally seek to avoid, sometimes in private meetings (caucuses) with only one of the parties, which is something that is not possible in arbitration as it would be deemed to contravene natural justice or the *principe du contradictoire*. A mediator may meet with the parties separately or together, and can suggest, but does not control procedural issues. He or she does not make substantive decisions or recommendations on issues of fact or law either. The parties thus have complete autonomy and flexibility at all times.

The Swiss Mediation Rules define mediation consistently with these distinctions 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**»³ (emphasis added).*

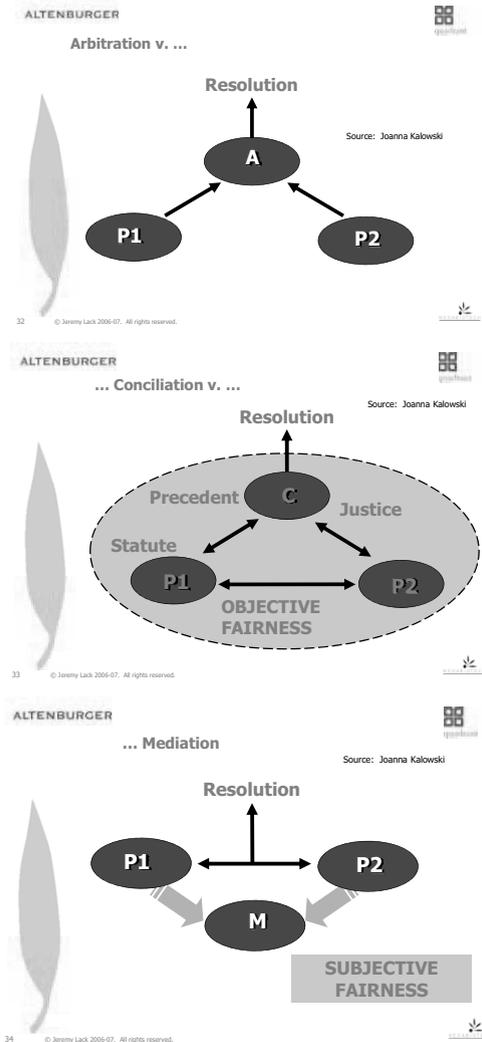
² FOLBERG/TAYLOR, pp. 7-8.

³ See

https://www.sccam.org/sm/download/swiss_mediation_rules_version_2007_english.pdf at «Introduction».

Figure 1 below summarizes these differences between mediation, conciliation and arbitration, in a graphical manner:

FIGURE 1: ARBITRATION, CONCILIATION & MEDIATION⁴



⁴ The author is grateful to Ms. JOANNA KALOWSKI of JOK Pty Ltd., Australia, for her consent to the use of these slides.

I. Combining ADR Processes

Although arbitration, conciliation and mediation are well known and have been practiced for many years, they tend to be viewed and treated as independent procedures. Because of their evaluative and norms-based nature, most arbitrators are comfortable acting as conciliators, in particular in Switzerland where there is a long tradition of conciliation, and some arbitrators have somewhat blurred the distinction between these two forms of private dispute resolution. Some Swiss arbitrators thus also act as conciliators (as opposed to mediators, as defined above) within the confines of their arbitrations, by making suggestions prior to issuing their awards⁵. Arbitrators and conciliators, however, are often uncomfortable with the non-evaluative nature of mediation, due to the perceived lack of objectivised norms, and the need to take into account individual needs and probe for subjective and future-looking interests that are part of a typical mediation process. Given that such probing sometimes takes place in one-on-one caucuses (depending on the mediator's training or the parties' preferences), which also raises the natural justice issues raised above, this activity often jars with these evaluative neutrals' procedural instincts, where the principle of adversarial hearings requires that the opposing party be present whenever a party is heard by the neutral.

Although there are some issues that require special consideration (*e.g.*, the use of caucuses in mediation), there is an increasing body of literature recently suggesting that mediation, conciliation and arbitration are fully compatible, and should be used and combined more often⁶. International arbitration is also undergoing increasing pressures in a flattening and increasingly technologically-dependant world, and some of its users are beginning to complain openly that arbitration has become slower,

⁵ For a thorough discussion of the use of conciliation in arbitration, see: SCHNEIDER, pp. 57-99, and more recently, KAUFMANN-KOHLER, also at <<http://www.ialecture.com/2007.html>>. In both of these papers, however, the authors do not make a distinction between mediation and conciliation, treating them as equivalent processes. They do not discuss possible differences between evaluative and norms-based conciliations as opposed to non-evaluative and subjective interests-based mediations, which may be highly relevant in certain contexts when considering combined ADR processes, or having the same neutral wear both hats.

⁶ For recent publications on combining mediation with arbitration, see (i) DENDORFER/LACK, (also published in *SchiedsVZ* 4/2007, pp. 195-205); (ii) PHILLIPS, pp. 73-79; (iii) VORYS, pp. 871-898; and (iv) BUHRING-UHLE/KIRCHHOFF/SCHERER, Chapters VIII – IX.

more cumbersome, more expensive and less user-focused, at a time when cost-efficiency, commercial pragmatism, and speed are increasingly important in resolving transnational disputes. Several leading international arbitrators have themselves been calling for reforms in arbitration practice, admitting that they too see international arbitration as becoming unduly costly, legalistic and rigid⁷. This sometimes makes arbitration too lengthy or expensive for some claimants, who although wishing to invoke their rights to initiate arbitration discover that they cannot afford to do so⁸. These same users also will not resort to conciliation as a process *per se*, preferring to opt for the certainty of outcome that arbitration has to offer. These growing complaints about arbitration are partly justified and are the reason why the ICC has recently set up a Task Force on Reducing Time and Costs in Arbitration, whose findings and recommendations are presented elsewhere in this publication by BERNHARD F. MEYER⁹. It is interesting to note, however, that the ICC Task Force's paper apparently does not refer to mediation or conciliation as possible methods for addressing some of these concerns, despite the ICC's recent re-issuance of its own Alternative Dispute Resolution Rules in July 2001, which provide for commercial mediation¹⁰. This demonstrates how arbitration, conciliation and mediation continue to be seen and treated as disparate and separate ADR proceedings, even by institutions that provide ADR services in each of these fields.

Although several ADR institutions are beginning to buck this trend by offering both mediation and arbitration rules, the majority of these institutions, provide only for **sequential** mediation and arbitration, that is to say mediation followed by arbitration («MED-ARB»), or arbitration followed by mediation («ARB-MED»)¹¹. These combined proceedings are in-

⁷ For a recent discussion on customer satisfaction, costs and the possible need for reform of modern arbitration see RUSHTON, pp. 16-21.

⁸ This is, paradoxically, seen in some cases as a benefit. It is known that certain arbitration clauses are inserted in certain agreements to act as a deterrent against any form of future litigation, since neither party expects it will ever be able to afford to apply them, or it will not be cost-effective to do so.

⁹ See pp. 1 *et seq.* of this publication.

¹⁰ For a copy of these ICC Rules and Guidelines, see <<http://www.iccwbo.org/court/adr/id4452/index.html>>.

¹¹ In MED-ARB proceedings, these are sequential processes, by which the parties will first try to resolve a dispute through mediation, and if the dispute is not fully resolved within a fixed period of time, it will be submitted to arbitration. In ARB-MED the steps are inverted, although the arbitration is normally completed and the arbitral tribunal's award is already

teresting in their own rights, and will be discussed further below. But some organisations have gone a step further, by providing specific rules for the running of mediation and arbitration proceedings **simultaneously**, in parallel (e.g., «MED//ARB»). The *Chambre de Médiation et d'Arbitrage de Paris* (CMAP), for example, is one of these ADR institutions. It has adopted specific rules for parallel mediation and arbitration proceedings in its «*Règlement de MED-ARB simultanés*» in 2006, which can be found on its website¹². These rules, however, forbid the mediation and arbitration processes from ever overlapping. For example, Article 9 of these rules provides for the independence of these two procedures by stating that the two should occur independently of one another and that CMAP will not provide the names of the neutrals involved in these proceedings to one another. The provision goes so far as to even forbid the mediator and arbitrator(s) handling these proceedings from ever having any interactions with one another, should they come to learn of one another's existence¹³. Another example of this is the creation of a mediation window or a carve-out from one process into another, where for example, certain procedural or substantive issues are removed from an arbitration or mediation, and a new process is commenced to resolve those issues, with the neutrals in the first process only being informed of the outcomes of the carved-out or window proceedings.

What is currently unknown and underdeveloped, pending further discussions within the ADR community, is the creation of new **hybrid processes**, which would fully integrate mediation and arbitration. One example of a hybrid is MEDALOA (Mediation and Last-Offer Arbitration), whereby if the parties have not reached an outcome through mediation by a predetermined time, they must each submit a final binding offer to the other party, and it is the mediator, now acting as an arbitrator, who will decide which of these two final offers is accepted. Although MEDALOA

drafted and sealed, but not issued, pending the outcome of the mediation process. The great debate for both of these processes is whether the same neutral can or should be allowed to act as both arbitrator and mediator, or whether a different neutral should be used. This is briefly discussed in Section IV.

¹² <http://www.cmap.fr/dl.php?table=ani_fichiers&nom_file=cmap_reglt_medarb.pdf&chemin=uploads/_cmap>.

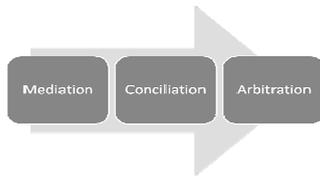
¹³ Art. 9 reads as follows in its original language, French: «*La médiation et l'arbitrage se déroulent indépendamment l'une de l'autre. Le Centre ne fait pas connaître au médiateur le nom du ou des arbitres et vice versa. Le médiateur et le ou les arbitres ont interdiction de s'entretenir de l'affaire s'ils viennent à se connaître*».

may be seen to be a sequential process, it is slightly more complex in that the same neutral is expected to become the arbitrator at the end of the mediation, and his or her discretion is limited to choosing only one of two offers when acting as an arbitrator. He is presumably supposed to take into account information received and knowledge gained during the mediation proceedings when choosing between these last offers, including in private caucuses, which puts psychological pressure on the parties to put whatever they think the arbitrator will find to be a more reasonable offer based on what happened in mediation. Thus the second step is not a true arbitration to some extent, in that the arbitrator is not looking at only the law and the facts, but also at the dispute and the process as a whole, and the parties behaviours. It could still be seen as a sequential process, however, if the second part is viewed as a new dispute, framed in terms of which of two last offers should be accepted, and where the arbitrator has been authorised to act *ex aequo et bono* in selecting only one of these offers. Another example of a hybrid procedure, which has not yet been used (to the author's knowledge) is a process involving hearings that are co-chaired by two neutrals, who co-mediate the dispute and depending on the occurrence of a triggering event or date, can either split (with one neutral becoming a mediator and the other a sole arbitrator), or become co-arbitrators, with the additional requirement that they must reach any decision as a tribunal by unanimity, and continue to use mediation to resolve any issues that they cannot reach consensus on.

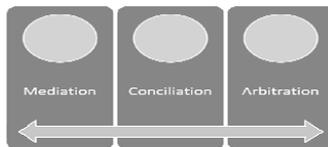
The new Swiss ADR Rules are particularly modern and pragmatic in that they not only allow for sequential and parallel ADR proceedings, but they do not restrict possible hybrid structures, and seem to provide for party autonomy in choosing procedural constructs and the selecting of neutrals¹⁴. These rules thus appear to allow for sequential, parallel and hybrid ADR procedures, in ways that few others would permit (although the Swiss ADR Rules do provide recommendations and warnings to safeguard arbitration and to create additional formalities if the same neutral will be wearing more than one hat, as discussed below).

¹⁴ See, e.g., Art. 15(5) SMR on hybrid processes, discussed further below.

FIGURE 2: THREE TYPES OF COMBINED ADR PROCEEDINGS



(a) Sequential ADR proceedings (e.g., MED-ARB, ARB-MED, ARB-MED-CON-MED-ARB¹⁵)



(b) Parallel ADR proceedings(e.g., MED//ARB or Mediation Windows)



(c) Hybrid ADR Proceedings(e.g., MEDALOA, co-«medarbitration»)

The Chambers of Basel, Bern, Geneva, Ticino, Vaud, Zurich and most recently Neuchatel adopted the Swiss Arbitration Rules that were drafted in 2004 and revised in 2006 in order to promote institutional arbitration in Switzerland and to harmonise the existing rules of arbitration throughout Switzerland. These Swiss Arbitration Rules replaced the different rules of international arbitration that some of these Chambers used to apply prior to that date. The result was a «federalised» set of uniform but flexible rules, based on the UNCITRAL Arbitration Rules, which account for modern best practices and take into account forward-looking cross-border dispute resolution issues in a pragmatic way.

¹⁵ See below, IV., for a discussion of this process.

The new Swiss Mediation Rules were subsequently adopted by the Chambers in April 2007 to go one step further than the Swiss Arbitration Rules, by adding a new procedural option in a manner that is flexible and fully compatible with arbitration, encompassing sequential, parallel and hybrid ADR proceedings. The Swiss Mediation Rules are thus somewhat unique in that they were written with the recent Swiss Arbitration Rules in mind, in such a way as to provide for compatibility between both sets of rules at all times, and to provide arbitrators and mediators with a greater range of tools for resolving disputes under institutional supervision using ADR. Unlike many other institutional rules for arbitration, the Swiss Arbitration Rules allow a great degree of flexibility, choice, and party autonomy across and between ADR processes, and explicitly state that the neutrals in both proceedings should be able to refer any portions of the disputes they are resolving to another ADR process¹⁶.

The rest of this paper will focus on these provisions in the Swiss ADR Rules and the range of possibilities that these rules create.

II. The Swiss ADR Rules

The Swiss Arbitration Rules («SAR») were adopted in 2004, before the Swiss Mediation Rules («SMR») were being considered. As a result, there is no mention of mediation within the SAR. On the other hand, the SAR already contained a number of flexible features that would allow for combining mediation with arbitration in new ways.

Article 15 SAR (General Provisions) provides that the *«the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that it ensures equal treatment of the parties and their right to be heard»*¹⁷ and that *«[a]t any stage of the proceedings, the arbitral tribunal may hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. After consulting with the parties, the arbitral tribunal may also decide to conduct the pro-*

¹⁶ Another institution that seems to have equally flexible rules, allowing for sequential, parallel or hybrid ADR procedures and whose rules have influenced the drafting of the Swiss Mediation Rules, is the World Intellectual Property Organisation (WIPO), with its Rules of mediation and arbitration, dated October 2001. For further information on these rules, see <<http://www.wipo.int/amc/en/center/wipo-adr.html>>.

¹⁷ Art. 15(1) SAR.

ceedings on the basis of documents and other materials»¹⁸. Although this does not refer to mediation, there is no reason for it to be excluded from the tribunal's discretion (subject to the parties' consent)¹⁹.

Article 27 SAR (Tribunal-Appointed Experts) also allows the tribunal, of its own volition (but after consulting with the parties), to appoint its own experts, for the submission of written reports. This could arguably encompass the appointment of a third party neutral to mediate discovery or other procedural issues, which although fully within the arbitral tribunal's scope of jurisdiction may be handled more effectively by third party neutrals in certain circumstances (e.g., where counsel and the parties come from both common law and civil law jurisdictions, and the tribunal does not wish to resolve these evidential issues first, but encourage the parties to come up with joint solutions for the hearing of witnesses, e.g., the use of witness conferencing).

Finally, Article 31 SAR (Decisions) provides that the presiding arbitrator, subject to the consent of the arbitral tribunal, may decide matters of procedure on his own, subject to revision, if any, by the arbitral tribunal²⁰.

These provisions, when taken together, suggest that an arbitral tribunal has broad discretion in managing its own proceedings under the Swiss Arbitration Rules, and that it should be able to issue procedural orders suggesting faster, cheaper or better ways of reaching a decision, delegating certain issues to the presiding arbitrator if necessary, which could include mediation. Thus, suggesting a mediation window or carving out a topic for mediation during an arbitration may be useful to resolve certain issues before a final award is granted (even if such issues are within the scope of the tribunal's jurisdiction), given that subjective interests may be more important in certain circumstances than objective norms (e.g. where issues of «face» or reputation may be at stake). Ordering the parties to attempt mediation may help to streamline the arbitration process, and it is difficult to see how this could be damaging to the process itself or the interests of the parties, since mediation proceedings are without prejudice and tend to have a 70-80% success track record according to

¹⁸ Art 15(2) SAR (emphasis added).

¹⁹ The requirement that the tribunal «ensures equal treatment of the parties and their right to be heard» raises a possible issue with respect to the use of caucuses in mediation, although if both parties are given equal opportunities to caucus then arguably this requirement is also met/has also been met.

²⁰ Art. 31(2) SAR.

most ADR centres. Furthermore, the principle of party autonomy would suggest that the arbitral tribunal should follow all joint requests made by the parties (save where they may be illegal). A mediation may provide the parties with an opportunity to report back to the tribunal with a unanimous request on a given issue, or to resolve a particularly problematic issue that the tribunal would prefer to have the parties work out on their own.

The arbitral tribunal, however, is constrained to some extent as to how it can exercise its discretion and its powers. Not only must it act to ensure at all times «*equal treatment of the parties and their right to be heard*», which may require special consideration in the context of caucuses, but Article 32 SAR (Form and Effect of the Award) specifies that any award must be in writing²¹ and that it «*shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given*»²². Article 33 SAR (Applicable Law, Amiable Compositeur) further provides that the arbitral tribunal shall decide the case «*in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection*»²³. The tribunal can only act as *amiable compositeur* or *ex aequo et bono* if the parties have expressly authorised the arbitral tribunal to do so²⁴ and the arbitral tribunal must decide all cases in accordance with the terms of the contract, taking into account the usages of the trade applicable to that transaction²⁵. It is thus clear that a tribunal must operate on the basis of laws and norms, although in cases where it has been expressly authorised to do so by the parties, the arbitral tribunal may dispense with the law to some extent and come to a decision based on what it considers to be fair and equitable in the circumstances at hand.

Article 34 SAR (Settlement or Other Grounds for Termination) provides a notable exception, however, to the normal constraints under which the arbitral tribunal must operate. It states as follows: «*If, **before the award is made**, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tri-*

²¹ Art. 32(2) SAR.

²² Art. 32(3) SAR.

²³ Art. 33(1) SAR.

²⁴ Art. 33(2) SAR.

²⁵ Art. 33(3) SAR.

bunal, **record the settlement in the form of an arbitral award on agreed terms**. The arbitral tribunal is not obliged to give reasons for such an award»²⁶. The arbitral tribunal thus has the discretion of accepting any settlement proposals jointly submitted to it by the parties, and recording it as an arbitral award, without having to give any reasons for doing so. There are no restrictions on the sorts of settlement agreements that the parties may propose, and Article 34 SAR would thus appear to be applicable to any settlement agreement that has been reached through mediation. The only constraints on such a consent award or an award on agreed terms (collectively, «Settlement Awards»), are that it be in writing in accordance with Article 32(2) SAR and that it comply with the formalities of signature, publication and the handling of originals imposed by Article 32(4)-(6) SAR²⁷. Scholars, the UNCITRAL Model Law on International Commercial Arbitration²⁸, as well as some national courts recognise such Settlement Awards as genuine arbitral awards that can be enforced under the New York Convention of 1958²⁹. Their enforceability subsequent to mediation, however, may be subject to local formalities and may be controversial if they can be perceived as no longer resolving a conflict at the time they were entered into³⁰. This can easily be resolved, however, by suspending the signature of a settlement agreement that has been obtained through mediation until an arbitral tribunal has been appointed, and presenting the arbitral tribunal with the draft text of the settlement agreement for approval prior to signing it, or making its execution conditional upon the ratification of an arbitral tribunal³¹.

²⁶ Art. 34(1) SAR (emphasis added).

²⁷ Art. 34(3) SAR.

²⁸ Art. 30 (Settlement) of the UNCITRAL Model Law on International Commercial Arbitration provides as follows: «(1) *If during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms*» and «(2) **An award on agreed terms [...] has the same status and effect as any other award on the merits of the case**» (emphasis added).

²⁹ LEW/MISTELIS/KRÖLL, pp. 636-37; BUHRING-UHLE/KIRCHHOFF/SCHERER, pp. 240-41.

³⁰ For a discussion on this, see HEMPEL, and SESSLER, pp. 229-236.

³¹ Although this may appear to be a controversial proposition, it is in fact fully supported by Art. 21 SMR (Settlement Agreement), which states: «*Unless otherwise agreed to by the parties in writing, **no settlement is reached until it has been made in writing and signed by the relevant parties***» (emphasis added). So long as no agreement has been signed, the dispute continues to exist. Thus, a draft settlement agree-

These provisions of the SAR, taken on their own, already provide for compatibility between mediation and arbitration as distinct ADR proceedings.

The Swiss Mediation Rules of April 2007, however, go further by making it clear that this compatibility with arbitration can be used **at any time** and that mediation can also take place in parallel with and **at the request of an arbitral tribunal**.

Article 23 SMR (Recourse to Arbitration) states that in both domestic and international mediations, *«the parties may jointly agree in writing **at any time during the course of their mediation**»* (emphasis added) to refer their dispute or any part of it for resolution by arbitration. These requests may be made under expedited procedure (Art. 42 SAR) or such other fast-track rules as may apply. They may also be expressly in the form of a Settlement Agreement: *«[i]f the parties settle the dispute during the arbitral proceedings»* based on a petition *«for the rendering of an award on agreed terms»*. Thus Article 23(1) SMR makes express reference to Article 34 SAR stating: *«If the parties settle the dispute during the arbitral proceedings, article 34 of those Rules shall be applicable for the rendering of an award on agreed terms»*.

Furthermore, Article 24 SMR (Mediation During the Course of Arbitration Proceedings) provides that *«[i]n all arbitral proceedings pending before the Chambers where mediation appears to be worth trying, whether in whole or in part, the Chambers **or the arbitrator(s)** may suggest to the parties to amicably resolve their dispute, or a certain part of it, by having recourse to a mediator»* (emphasis added). Although this provision cannot be found in the SAR, where it really belongs, it suggests that the Chambers will interpret both sets of rules, which they administer, as al-

ment reached through mediation has no legal impact on the parties under the SMR until such time as it has been signed, which can be done after the tribunal has been appointed. Furthermore, Art. 34(1) SAR specifies that such an agreement must be accepted by the tribunal before it becomes an arbitral award on agreed terms, and an arbitrator can refuse to endorse such an agreement, meaning that the dispute would still exist as well. This could be an excellent way of reassuring the parties that their draft settlement agreement will be carried out, as any breach of such an agreement, once it becomes an arbitral award on agreed terms, would normally be entitled to immediate execution under the New York Convention, and it would thus seem a reasonable precaution for both parties to have their agreement ratified by an independent arbitrator before it becomes binding if it really reflects their negotiated solution.

lowing an arbitral tribunal to suggest to the parties to submit all or part of their dispute to mediation (whether in parallel, separate or hybrid proceedings), so long as this is consistent with the scope of the arbitral tribunal's discretion under Article 15 SAR.

Further provisions in the SMR with respect to arbitration are as follows:

- Article 6 SMR (Arbitration Agreement) provides that where the parties do not completely resolve a dispute by mediation and are bound by a pre-existing arbitration agreement under the rules for arbitration of one of the Chambers, the matter may be automatically submitted to binding arbitration by a party filing a Notice of Arbitration, as provided for by the applicable arbitration rules of that Chamber³².
- Article 15 SMR (Conduct of the Proceedings) states that a mediator may end a mediation whenever, in his/her opinion, further efforts would not contribute to a resolution of the dispute between the parties, at which time the mediator may then suggest other dispute resolution tools to the parties, including: a) an expert determination of one or more particular issues of the dispute; b) the submission of last offers (*i.e.*, MEDALOA); or c) arbitration³³.
- Article 22 SMR (Subsequent Proceedings) provides that where the parties agree (and **only** if so), a mediator can act as arbitrator, judge, expert, or as representative or advisor of one party in any subsequent proceedings initiated against one of the parties to the mediation after the commencement of the mediation³⁴, and if so, the neutral may take into account information received during the course of the mediation³⁵.

Finally, in their model mediation clauses, the SMR provide the following ADR clause for mediation followed by international arbitration³⁶:

³² Art. 6 SMR.

³³ Art. 15(5) SMR.

³⁴ Art. 22(1) SMR.

³⁵ Art. 22(2) SMR. This article must be interpreted, however, together with Art. 18 SMR (Confidentiality), which also states that **written** consent is required, rendering it advisable to have a written agreement to that effect signed by the parties. See the discussion of waivers below, Section IV.

³⁶ SMR model clauses, as amended on 2 July 2008.

«Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be submitted to mediation in accordance with the Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce in force on the date when the request for mediation was submitted in accordance with these Rules. The seat of the mediation shall be ... [name of a city in Switzerland, unless the parties agree on a city abroad], although the meetings may be held in ... [specify place]. The mediation proceedings shall be conducted in ... [specify desired language]. **If such dispute, controversy or claim has not been fully resolved by mediation within 60 days** from the date when the mediator(s) has (have) been confirmed or appointed by the Chamber, **it shall be settled by arbitration** in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force on the date when the Notice of Arbitration was submitted in accordance with those Rules. The number of arbitrators shall be ... [one or three]. The seat of the arbitration shall be in ... [name of a city in Switzerland, unless the parties agree on a city abroad]. The arbitral proceedings shall be conducted in ... [specify desired language]. The arbitration shall be conducted in accordance with the provisions for Expedited Procedure [if so wished by the parties]» (emphases added).

The SMR thus suggest a classic MED-ARB model clause. This model clause does not state, however, that the mediation process is automatically terminated after 60 days, but only that arbitration proceedings should not commence before that date. The 60 days time limit is not necessarily a termination time-limit set by the parties in accordance with Article 20(1)(c) SMR. Article 15(5)(c) SMR also provides that the mediator should only exercise his discretion in terminating a mediation for a subsequent arbitration «*whenever, in his/her opinion, further efforts would not contribute to a resolution of the dispute between the parties*». The clause should not be automatically interpreted, therefore, as providing for the termination of initial mediation proceedings, but as a possible opening of parallel arbitration proceedings after 60 days, which is appropriate if the mediator and the parties still think it worthwhile to keep the mediation process ongoing (for example to seek agreement on procedural issues linked to the arbitration, such as submission of evidence, witness hear-

ings, deadlines, cost allocations, etc.). In any event, this is a matter of free choice for the parties, and all it takes is for one party to withdraw from the mediation should it wish to end it at that stage, given the voluntary nature of mediation proceedings³⁷.

III. Switching Hats

The greatest issue that arises whenever combined ADR processes are considered is whether the same neutral can act as mediator, conciliator and/or arbitrator. This is primarily a matter to be left to party autonomy according to the Swiss ADR rules, and for each individual neutral to consider. One leading Swiss arbitrator, who routinely sits as the chairman on large international arbitrations and has trained as a mediator as well, has stated that he often offers the parties the possibility of creating windows for mediation and conciliation within his arbitration proceedings. He has thus conducted ARB-MED-CON-MED-ARB proceedings, starting as the chairman of the arbitral tribunal, subsequently holding mediation sessions with the parties and their counsel (including caucuses), then offering proposals or a non-binding assessment of the legal situation in conciliation, and then reverting to mediation, and ultimately, back to arbitration. At each step of the process, the parties are informed of the issues and risks, and are asked to sign a written waiver, accepting that the neutral may continue to act on this basis at each stage of the process. As it turns out,

³⁷ In fact, it is not clear whether the Chambers' model MED-ARB clause would be entitled to specific performance under Swiss law at present, since it is not clear whether a party can be compelled to mediation process prior to arbitration, even where a contractual MED-ARB clause exists. Until the Swiss Code on Civil Procedure comes into effect in 2011, it is not even clear whether mediation is a form of judicial proceedings (save, possibly, in the Canton of Geneva) that can be imposed on a party. The Swiss Federal Tribunal recently held on 6 June 2007 that the parties to a MED-ARB clause could skip the mediation process step and proceed straight to arbitration, although the case seems to have been decided primarily on its specific facts, and the atypical language of the ADR clause in that agreement (DFT of 6 June 2007 (4A_18/2007)). Although this MED-ARB clause therefore may not be specifically enforceable *per se*, failing to respect it would, however, be a breach of contract for which damages could be requested. Determining *quantum* for this may be difficult, but damages could arguably be assessed as non-payment of legal fees in case of losing in arbitration, or 100% reimbursement of all legal fees and management time in case of winning in arbitration, given mediation's 70-80% settlement rate.

this neutral states that he has never had to go back to arbitration, as the cases have always succeeded in settling (on faster, and better terms, according to those involved). Although this is only anecdotal, and it is impossible to generalise based on one person's experience, the institution that has handled these cases as well as the parties have expressed their satisfaction with the process, and their willingness to do it again.

Certainly, many of these issues are also addressed by mediators resisting caucusing with the parties, and doing everything in joint session. Although working only in joint sessions is not a technique commonly used in Anglo-Saxon mediations, it is quite common in some other jurisdictions (e.g., in Austria and the Netherlands) and is growing in popularity in the USA³⁸. This should not create a problem, therefore, for a mediator who is trained in one of these schools, who has agreed to act as a sole arbitrator subsequent to mediation, where no caucuses have taken place and the parties have agreed to his/her taking on an adjudicative role.

The Swiss ADR Rules specifically provide for this issue at Article 22 SMR as follows:

«Article 22 – Subsequent Proceedings

1. Unless the parties expressly agree otherwise, the mediator cannot act as arbitrator, judge, expert, or as representative or advisor of one party in any subsequent proceedings initiated against one of the parties to the mediation after the commencement of the mediation.

2. If the parties decide to designate the mediator as arbitrator, judge or expert in any subsequent arbitral proceedings, the latter may take into account information received during the course of the mediation» (emphasis added)

The Swiss Mediation Rules specifically provide for this issue by expressing a concern that the mediator should not take on an evaluative role unless the parties have expressly agreed to this. When this happens, the neutral is allowed to take into account information received during the course of

³⁸ For an example of this form of commercial mediation, see FRIEDMAN/HIMMELSTEIN, whose most recent book explains the advantages of not caucusing in mediation to gain a deeper understanding of the conflict, and gives several examples of how sensitive matters were actually resolved in joint sessions in actual cases, without the mediator having to meet separately with the parties.

the mediation, although in order to avoid possible contradictions with Article 18 SMR, it is recommended that the parties sign written waivers to this effect³⁹.

The primary question in all of these combined processes, however, is not whether the neutral feels comfortable in changing hats, but whether the parties are able to differentiate between the same person when acting in each role. The September 2005 *Model Standards of Conduct for Mediators* issued by the American Arbitration Association, the American Bar Association, and the Association for Conflict Resolution contain some sensible provisions to that effect, which any neutral should consider before changing roles⁴⁰.

IV. Conclusion

The Swiss ADR Rules are modern and pragmatic, opening up a broad spectrum of new dispute prevention and resolution processes in Switzerland for both international and domestic disputes. The SMR were written to integrate seamlessly with the SAR, and this has been well achieved, opening up new prospects and choices for disputants and neutrals, who can now combine commercial mediation with arbitration. It is important, however, as this field evolves, that the parties, their counsel and the neutrals understand the processes they subscribe to, and the issues and opportunities that combined ADR processes will present in the future.

³⁹ Art. 18(1) SMR (Confidentiality) reads as follows: «*Mediation is confidential at all times. Any observation, statement or proposition made before the mediator or by him/herself cannot be used later, **even in case of litigation or arbitration, unless there is a written agreement of all the parties***» (emphasis added).

⁴⁰ For a copy of these standards, see <<http://www.abanet.org/dispute/news/ModelStandardsOfConductforMediatorsfinal05.pdf>>.