

SWISS CHAMBERS' ARBITRATION
INSTITUTIONwww.swissarbitration.org

C S M C Chambre Suisse de Médiation Commerciale
S K W M Schweizer Kammer für Wirtschaftsmediation
C S M C Camera Svizzera per la Mediazione Commerciale
S C C M Swiss Chamber of Commercial Mediation

Commercial Mediation (in Geneva): Why, how and with whom ?

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2011: «Parajudicial Mediation» in the Federal Procedural Laws

➤ *«Le règlement à l'amiable la priorité, parce que les solutions transactionnelles sont plus durables et subséquemment plus économiques du fait qu'elles peuvent tenir compte d'éléments qu'un tribunal ne pourrait retenir.»* (Message to Code of civil procedure FF 2006 6860)

- **Civil matters**

- Articles 213-218 Swiss Code of Civil Procedure (RS 272)

- **Criminal matters**

- Articles 5 and 17 Federal Act on Criminal Juvenile Procedure (RS 312.1)

- Article 34A Geneva law implementing the Swiss Code of Criminal Procedure (10)

- **2013: Constitution of Geneva** (Art. 36, 115, 120)

2011 : State Regulations

Loi d'organisation judiciaire de Genève Art 66–75 (E2 05)

- Sworn Mediators: (<http://ge.ch/justice/mediation>)
 - Tableau des Médiateurs assermentés
 - Commission de préavis du Conseil d'Etat
- Independence, Neutrality & Impartiality
- Secrecy - Confidentiality - without prejudice – no testimony by Mediator
- Sanctions !

Règlement genevois relatif aux Médiateurs pénaux et civils

- Ethics: European Code of Conduct for Mediators (cf Directive 2008/52/CE)

<http://www.ge.ch/dse/justice/?rubrique=mediation>

Institutional Framework : the Swiss Rules of 2007

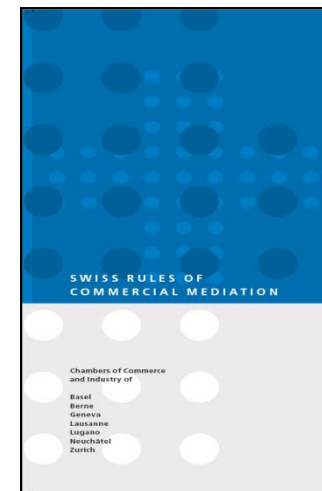
To better serve business

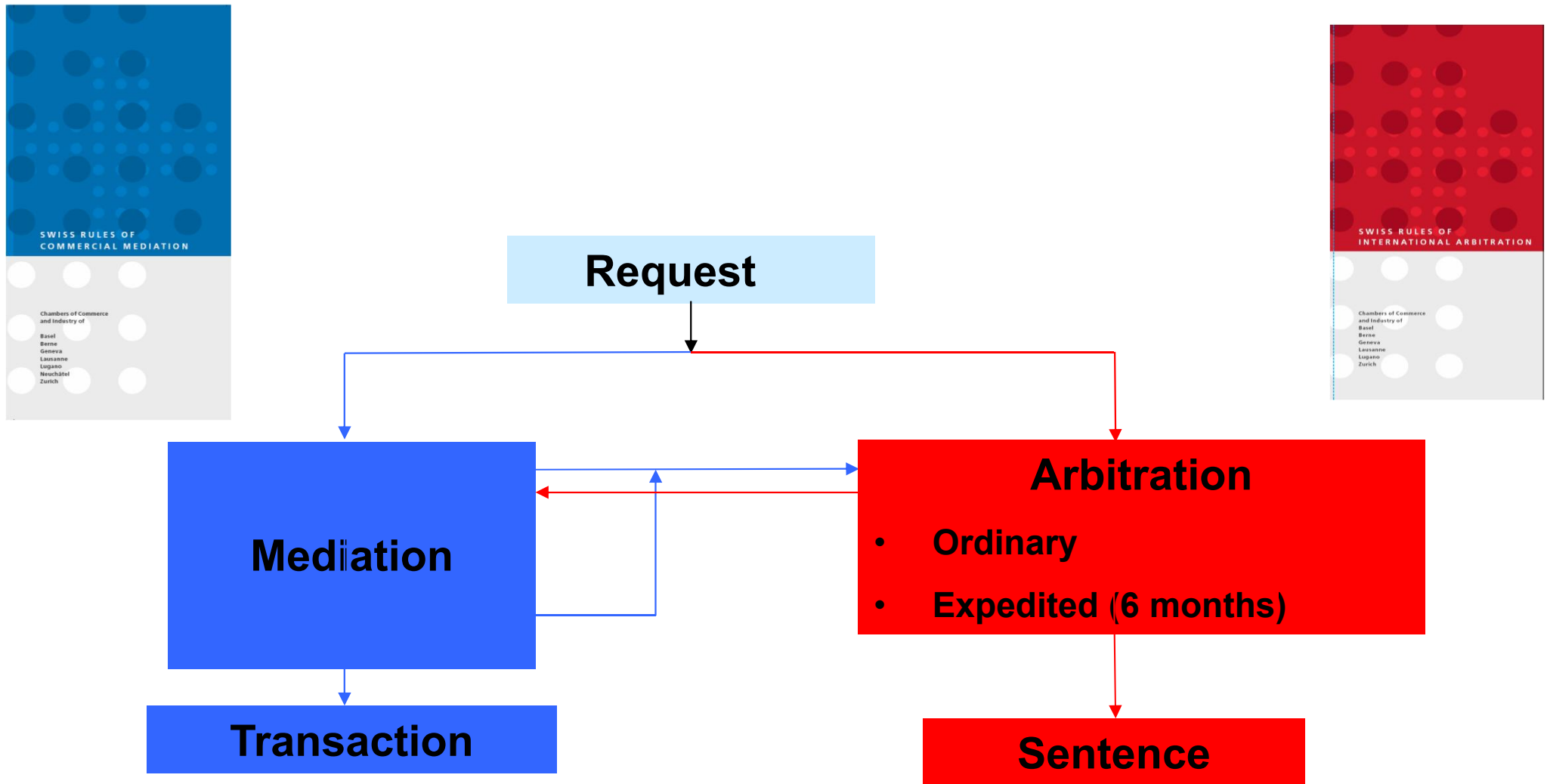
The Swiss Chambers of Commerce are private institutions representing a multitude of companies within industry, the service sector and commerce. With the Swiss Rules of Commercial Mediation the Chambers of Commerce of Basel, Berne, Geneva, Neuchâtel, Vaud, Ticino and Zurich offer an alternative method for settling disputes.

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.**

The mediation can be terminated at any time, if the parties do not reach a mutually satisfactory settlement, or if one of the parties wants to discontinue the process.

Modern, flexible, cheap, & commercially-oriented.





Swissrules: www.sccam.ch

Top of the iceberg
The dispute



The conflict
Below the iceberg

Arbitration :

- Makes an exam of the **dispute**
- Only decides about the effect of the conflict



Mediation:

- Takes care of the **conflict**
- Resolves the cause of the dispute

- **Tableau des médiateurs de Genève-
Domaine commercial**



www.ge.ch/dse/doc/justice/mediation/tableau-mEDIATEURS-civils-201510-2.pdf

- **SCCM Swiss Chamber of
Commercial Mediation**

www.csmc.ch

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Mediation Agreement

- Parties - Mediator
- Issues to be discussed
- Confidentiality
- Suspension or not of legal proceedings
- Timing
- Language
- Costs
- Liability of the Mediator
- ...



+ Reference to the Swiss Rules of Commercial Mediation

WHY ?

*«We have to start
by defining the process as
part of the problem.»*



David Plant

Mediation definitions

❑ Mediation is Negotiation facilitated by a trusted Neutral Person.

IMI

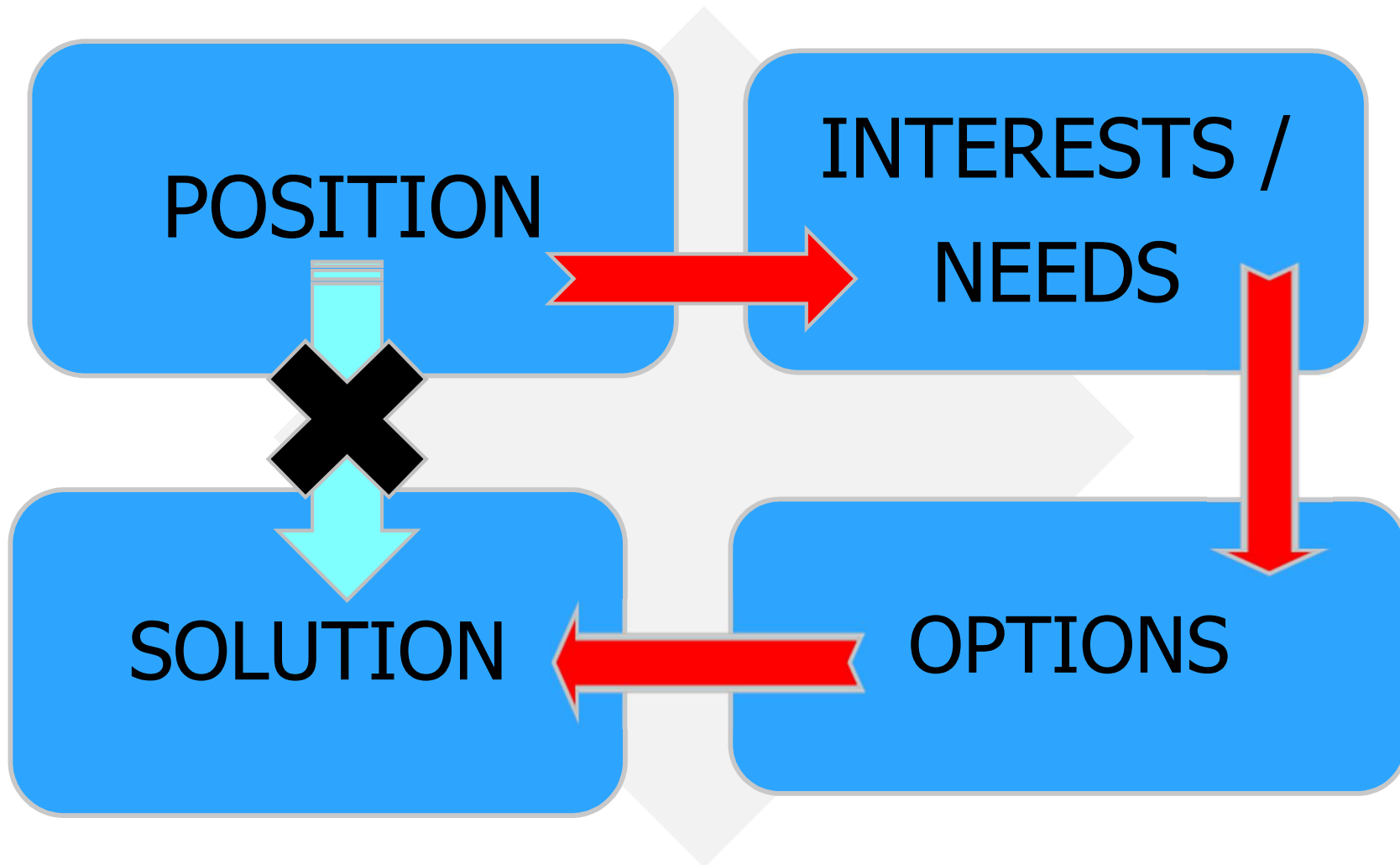
❑ **Mediation** is an alternative method of dispute resolution whereby two or more parties ask a neutral **third party, the Mediator**, to assist them in settling a dispute or in avoiding future conflicts.

The Mediator is **neutral** and **independent** from the parties

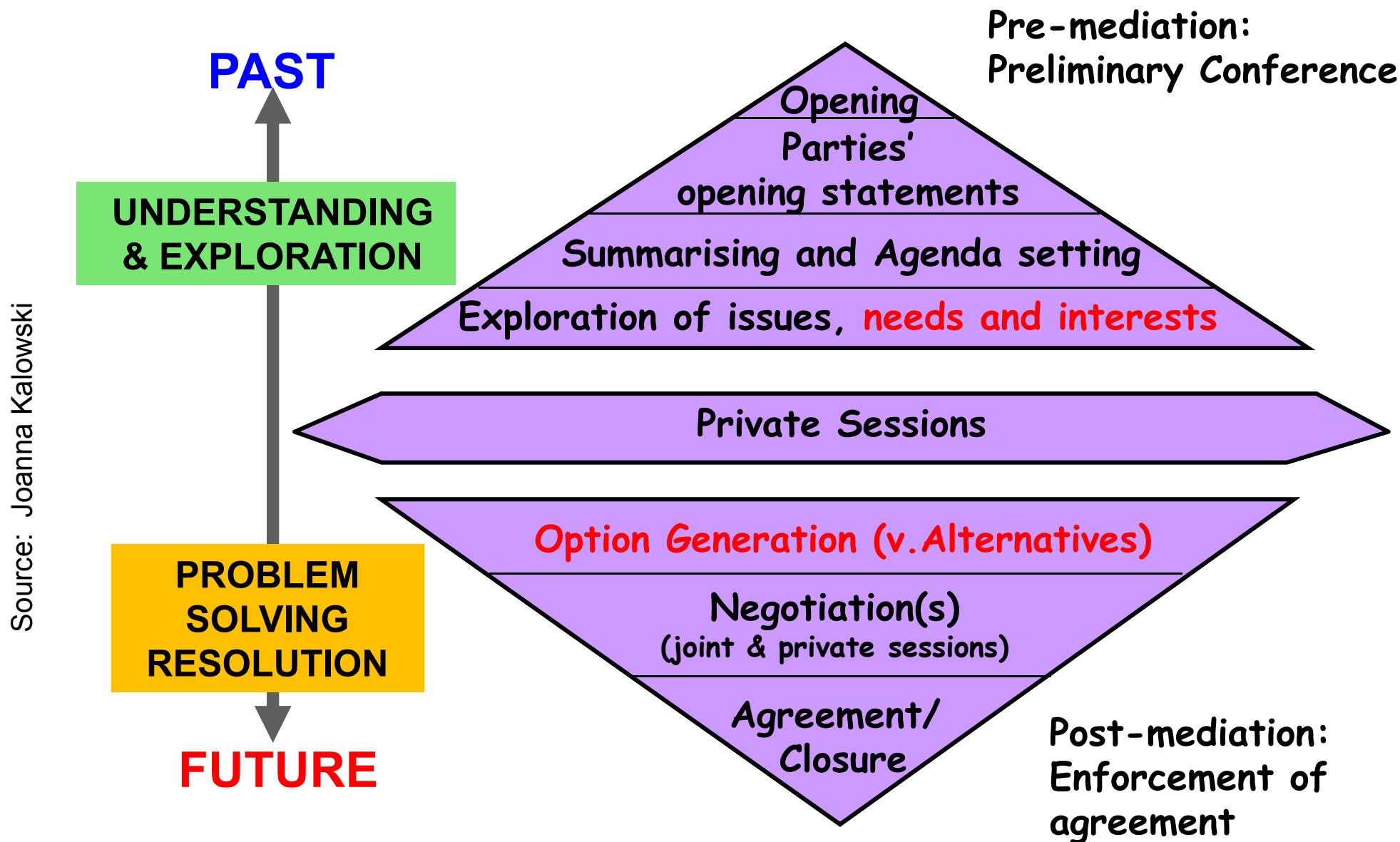
He/she **facilitates the exchange of opinions** between the parties and **encourages them to explore solutions** that are acceptable to all the participants.

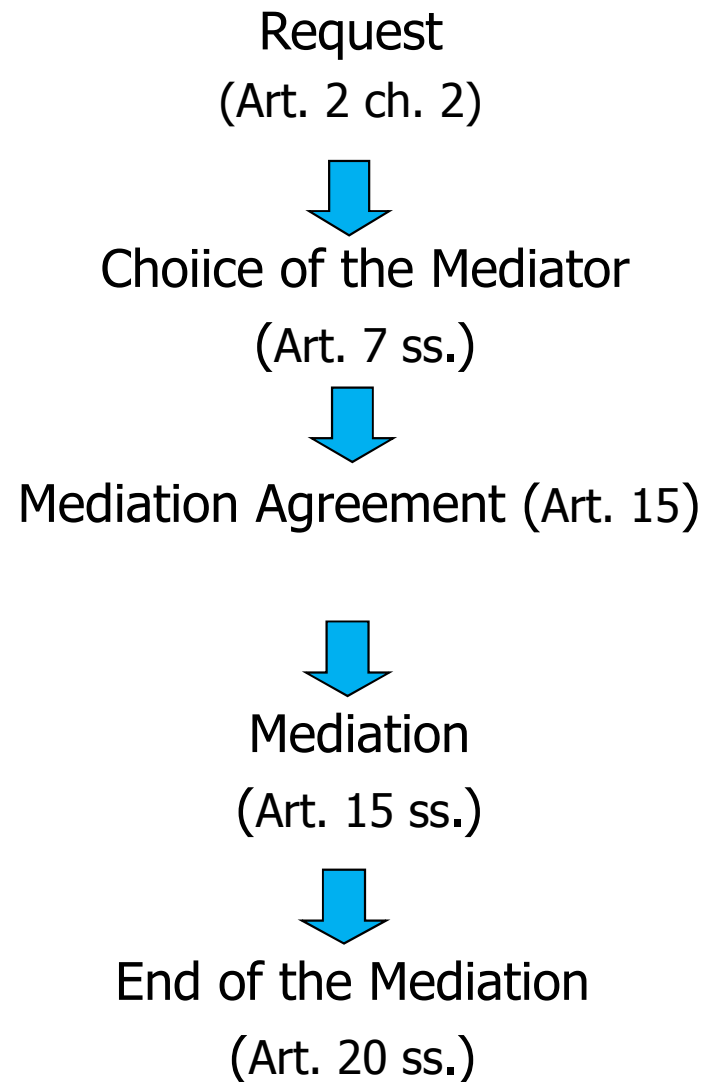
Unlike an expert, the Mediator **does not offer his or her own views nor make proposals** like a conciliator. Unlike an arbitrator, he/she **does not render an award**.

Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry – April 2007 – www.sccam.org



Mediation sequences





Swissrules: www.sccam.ch

Mediation Clause (multi step) **Swiss Rules**

*"Any dispute, controversy or claim arising out of or in relation to this contract / Trust Deed, 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 Geneva, Switzerland.

The mediation proceedings shall be conducted in English.

*If such dispute, controversy or claim has not been fully resolved by mediation within 60 days after the appointment of the Mediator, 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 to those Rules.*

The number of Arbitrators shall be one; the seat of the Arbitration shall be in Geneva, Switzerland.

The arbitral proceedings shall be conducted in English.

The arbitration shall be conducted in accordance of the Expedited Procedure of one or all parties so request ."

Mediation process: timing and length

- **A mediation can be initiated and performed at any time before and during legal proceedings**

- Also before or during the emerging of a conflict:

«**Early Dispute Resolution:**

The earlier ADR processes are implemented in the conflict cycle, the less risk there is of the dispute escalating out of control . »

Hans Peter Frick, Group General Counsel, Nestlé SA



- **Generally 3 to 5 mediation sessions**

Mediation: some Statistics (Source: ACB, NL 2006)

Average duration of a mediation	4 x ½ day sessions
No. of disputes resolved in a single session	15%
Percentage of cases reaching a settlement	79%
Willingness of the parties to repeat mediation	92%
Average value of the dispute	Euro 5 million
Average cost	Euro 5'000.00 / party

<http://www.mediation-bedrijfsleven.nl/english.shtml>

Mediation War Stories under the Swiss Rules

- ❖ Real Estate financing (GE + VD)
Two different dispute resolution clauses ...
= 3 sessions of 5 hours each

- ❖ Distribution agreement - Medical device (CH : US + Canada)
Med // Arb
= 2 days (mediation)

- ❖ Shareholders /BoD members: Expert in the mediation

- ❖ Counsel in Mediation -

Questions ?

Commercial Mediation in Geneva

Why?

How?

With whom ?

