

ASA BULLETIN

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Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

- Articles
- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including ICC, ICSID and the Swiss Chambers of Commerce ("Swiss Rules")
- Notices of publications and reviews

Each case and article is usually published in its original language with a comprehensive head note in English, French and German.

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Books related to the topics discussed in the Bulletin may be sent for review to the Editor (Matthias Scherer, LALIVE, P.O. Box 6569, 1211 Geneva 6, Switzerland).

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Advantages and Benefits of the Revised Swiss Rules of Mediation 2019 – in Light and in Line with the Singapore Convention

CAROLINE MING*, CHRISTIAN IOVENE**

Swiss Chambers' Arbitration Institution – SCAI – Mediation – Singapore Convention – Swiss Rules of Mediation – Settlement agreements – Certificate – Multi-tier clauses – Time-bar – Enforcement

Specialists in dispute resolution usually concur nowadays in acknowledging that mediation is a useful and complementary tool to arbitration and litigation, in particular for international or multi-party disputes or when relationships, time and costs are of the essence. The Swiss Chambers' Arbitration Institution ("SCAI") published its first mediation rules in 2007 and, aside from administering more than a thousand arbitration and mediation cases, it has been working for more than 15 years on drafting efficient dispute resolution clauses and rules in view of continuously improving the quality of its services. SCAI's 2019 revised Swiss Rules of Mediation (the "Rules" or the revised Swiss Rules of Mediation) entered in force on 1 July 2019, just before 46 countries signed the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the "Singapore Convention on Mediation" or "Singapore Convention", on 7 August 2019. The Singapore Convention will enter into force on 12 September 2020.

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The 2019 revision of the Swiss Rules of Mediation aimed to facilitate and further encourage the use of the Rules by clarifying certain points and amending the wording of the Rules to make them more concise. The Rules contain several provisions that will allow the parties to benefit from the advantages of the Singapore Convention, notably the enforceability of settlement agreements resulting from mediation.

Compared to the 2007 Swiss Mediation Rules, the revised Swiss Rules of Mediation have five main features:

1. A simplified procedure for the designation of a mediator in certain types of cases (art. 5);
2. Provision of a certificate of mediation confirming that the mediation took place and stating whether it resulted in a settlement (art. 16(5));
3. Certification and authentication of settlement agreements (art. 17(2) and (3));
4. Creation of an Advisory Council for Mediation, which provides guidance and assistance on mediation cases and fees (Introduction and art. 24(4)); and
5. Improved links between mediation and arbitration or litigation (arts. 18 and 19 and art. 1.8 (Appendix B); as well as arts. 16(5) and 17(2) and (3) with the provision of certifications and authentications).

1. A Simplified Designation Procedure

Founded and owned by the main Swiss Chambers of commerce and industry, SCAI is committed to providing high quality but reasonably priced commercial dispute resolution services not only to large companies, but also to SMEs and entrepreneurs. When the amount in dispute is lower than CHF (\approx USD) 50'000, a simplified, expedited, and lower cost procedure will in principle be applied.¹

This designation procedure is simplified in that, either the parties jointly designated an acceptable mediator at the outset and SCAI's support is limited to confirming such mediator, or the SCAI Secretariat will appoint a mediator whose qualifications are as close as possible to the parties' preferences and desires as expressed by them at the outset of the proceedings. The parties remain however free to opt out anytime of the simplified designation procedure by objecting to its application and requesting to proceed under the standard procedure.

¹ Swiss Rules of Mediation, July 2019, published by the Swiss Chambers' Arbitration Institution, in force since 1 July 2019, Article 5 of the Rules and Article 1.4 of Appendix B.

When the amount in dispute is above CHF 50'000 but time is of the essence and/or when the parties are comfortable entrusting SCAI with the appointment of the mediator, the parties may also elect to opt in voluntarily for the simplified designation procedure.

The cost differential between a standard and a simplified designation procedure is as follows: In a standard mediation, the registration fee amounts to CHF 1'000 for each party to the mediation.² The registration fee for simplified designation procedure amounts to CHF 1'000 in total for two party mediations; when the mediation involves more than two parties, an additional fee of only CHF 250 per additional party is requested.³ It is also worth noting that SCAI does not charge administrative costs when the amount in dispute is below CHF 50'000.⁴ Currently, the Swiss Rules of Mediation are the only rules of a major institution to allow a simplified and cost-efficient procedure with these specific characteristics.⁵

2. The Certificate of Mediation

Another novelty brought by the revised Swiss Rules of Mediation is the possibility to request SCAI to issue a certificate of mediation confirming that a mediation took place and stating whether it led to a settlement (“Certificate of Mediation”).⁶ Such a certificate can prove particularly useful (i) in multi-tiered clause cases, (ii) as evidence of time-bar interruption or suspension, and (iii) for enforcement of settlement agreements. More specifically:

- (i) **Multi-tiered dispute resolution clauses** are clauses imposing pre-adjudicatory requirements on the parties before the commencement of arbitral⁷ or court proceedings. In other words, they are contractual

² Swiss Rules of Mediation, *op.cit.*, Article 1.1 Appendix B.

³ Swiss Rules of Mediation, *op.cit.*, Article 1.4 Appendix B.

⁴ Swiss Rules of Mediation, *op.cit.*, Article 2.2 Appendix B.

⁵ The Milan Chamber of Commerce (the “CAM”) and the International Institute for Conflict Prevention & Resolution (the “CPR”) have their own Fast-Track Mediation Rules. However, those sets of rules, do not contain a designation procedure similar to the one contained in the Swiss Rules and are applicable only through an express agreement of the parties. For more information see: the CPR Fast-Track Mediation Rules (at <https://www.cpradr.org/resource-center/rules/mediation/fast-track-meditation-rules-of-procedure>) and the CAM Fast Track Mediation Rules (at https://www.camera-arbitrale.it/Documenti/ftmr_eng-rules.pdf).

⁶ Swiss Rules of Mediation, *op.cit.*, Article 16(5).

⁷ Milivoje Mitrovic, Dealing with the Consequences of Non-Compliance with Mandatory Pre-Arbitral Requirements in Multi-Tiered Dispute Resolution Clauses-The Swiss Approach and Look Across the Border, *in* ASA Bulletin, Vol. 37, No.3/2019, Matthias Scherer (ed.), pp. 559-631, p. 559.

provisions whereby the parties agree that in the event of a dispute, they will seek to settle their dispute through various ADR⁸ mechanisms prior to commencing arbitration or litigation. The clause may be drafted so that the pre-arbitration or pre-litigation steps are binding, in which case a Certificate of Mediation may prove to be a powerful tool in proving that the parties have abided by such steps and that the arbitral tribunal or state court seized has jurisdiction. In the absence of such evidence, a state court may stay the proceedings or set-aside or refuse to enforce an award, in circumstances where the arbitral tribunal proceeded to hear the case despite the defendant's raising the plea of non-exhaustion of pre-arbitral ADR by the claimant.⁹ In Switzerland, the Swiss Federal Tribunal ruled in 2016 that an arbitral tribunal should order to stay the proceedings and set a time limit for the parties to complete the pre-arbitral steps.¹⁰ In a recent arbitration case administered by SCAI, the sole arbitrator followed this decision of the Swiss Supreme Court. In Germany and in France the non-compliance with the multi-tiered clause does not affect the jurisdiction of the arbitral tribunal but the admissibility of the claim.¹¹ Therefore, a claim could be declared inadmissible if the respondent succeeds in pleading the non-exhaustion of mandatory pre-arbitral ADR steps by the claimant.

- (ii) Secondly, a Certificate of Mediation can be used to establish the **starting date of the mediation**. Indeed, in some jurisdictions, the filing of a request for mediation can interrupt or suspend the prescription period for filing a claim.¹²

⁸ ADR: Alternative Dispute Resolution.

⁹ Ewelina Kajkowska, *Enforceability of Multi-tiered Dispute Resolution Clauses*, Hart Publishing (Oxford and Portland, Oregon) (2017), p. 164.

¹⁰ ATF 142 III 296 of 16 March 2016, ASA Bull. 4/2016, p. 988, c. 2.4.4.1; Milivoje Mitrovic, *op.cit.*, p. 565.

¹¹ Decision BGH, NJW-RR 2016, pp. 703 et seq.; Decision BGH, NJW 2017, pp. 488 et seq.; Société Nihon Plast Co. v. Société Takata-Petri Aktiengesellschaft, 4 March 2004, Cour d'appel de Paris (1st Civil Chamber), reported in *Revue de l'Arbitrage*, 1/2005, p. 143 et seq.; Société Vijay Construction Ltd. v. Société Eastern European Engineering Ltd., 28 June 2016, Cour d'appel de Paris (1st Pole, 1st Chamber) Reported in *Revue de l'Arbitrage*, 4/2016, p. 1153 et seq.; Milivoje Mitrovic, *op.cit.*, p. 569, 573.

¹² *E.g.*, in accordance with Article 154 of the Turkish Commercial Code, submitting an application to mediation has the same effect as lodging a claim with regards to interruption of the time bar (see: <https://www.ukpandi.com/knowledge-publications/publications/article/turkey-time-bars-148232/>). For more information about mediation in Turkey see: <http://www.inal-law.com/mediation-in-commercial-disputes-in-10-questions/>; see as well, *e.g.*, Article 5(6) of the Italian Legislative Decree No. 28/10; Article 202(3) of the Russian Civil Code; Article 185 of the Greek law 4512 2018 on Arrangements for the Implementation of the Structural Reforms of the Economic Adjustment Programmes and Other Provisions.

- (iii) The third instance where a Certificate of Mediation may be useful is when a party seeks to **enforce a settlement agreement** under the Singapore Convention.

The Singapore Convention was adopted in December 2018 and opened for signatures since 7 August 2019. To date, the Singapore Convention has been signed by 52 countries,¹³ including some of the world's largest economies such as the United States, China, India and Turkey. At the time this article was completed (April 2020) it has been ratified by Singapore, Fiji and lastly by Qatar. It will enter in force on 12 September 2020, i.e. six months after the deposit of the third instrument of ratification, acceptance, approval or accession.¹⁴

The Singapore Convention applies to international commercial settlement agreements resulting from mediation ("Settlement Agreement"), establishing a harmonized legal framework for the right to invoke Settlement Agreement as well as for their enforcement.¹⁵ Each State Party to the Convention shall enforce Settlement Agreement resulting from mediation in accordance with its rules of procedure and under the conditions of the Convention (Article 3(1) Singapore Convention).¹⁶

¹³ See: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status, accessed on 17 April 2020.

¹⁴ Article 14(1) of the Singapore Convention.

¹⁵ The Singapore Convention is an instrument for the facilitation of international trade and the promotion of mediation as an alternative and effective method of resolving trade disputes. Being a binding international instrument, it is expected to bring certainty and stability to the international framework on mediation; United Nations Commission on International Trade Law, see: https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements.

¹⁶ It is worth noting that the Singapore Convention does not contain a provision allowing reciprocal reservations similar to that found in Article 1(3) of the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York the 10 June 1958). The proposal was not supported for the Singapore Convention since the insertion of such a reservation might have created confusion with respect to the field of application of the Convention in light of the difficulty to identify the country of origin of a given Settlement Agreement; United Nations Commission on International Trade Law, fifty-first session, New York, 25 June - 13 July, Report of Working Group II (Dispute Settlement) on the work of its sixty-eight session (New York, 5-9 February 2018) para. 81 and 83.

The perfect synergy between the Singapore Convention and the Swiss Rules of Mediation on this point is not just a coincidence. The idea of a certification by the institutions and of a legislative recognition thereof, came to mind and was first discussed in September 2016 during a mediation breakfast held in Geneva, Switzerland, with the Swiss delegates of the UNCITRAL Working Group II.¹⁷

The idea found its support and, according to Article 4(1)(b)(iii) of the Convention, an institutional certificate of mediation may now serve to prove that a settlement agreement has resulted from the mediation and therefore can be enforced under the said convention.¹⁸ Upon request, SCAI may also issue certified copies of its Certificate of Mediation¹⁹ and, upon request, have them notarized and apostilled. As will be discussed below, SCAI may also certify and authenticate settlement agreements and provide certified, notarized and apostilled copies of settlement agreements.

3. The Certification of Settlement Agreement

a. The Certification of Settlement Agreement in the Framework of the Singapore Convention

Upon request of the parties and the mediator's confirmation that he/she witnessed the parties signing the settlement agreement, or alternatively, if the parties sign the settlement agreement at the SCAI Secretariat, SCAI may provide the parties with a certificate of authenticity of the settlement agreement.²⁰ SCAI may also issue certified copies of the settlement agreement to the parties,²¹ as well as have them notarized and apostilled.

Like the certificate of mediation, the certificate of authenticity of the settlement agreement is an attestation issued by the institution administering the mediation, and, therefore, acts as evidence that a given settlement agreement resulted from mediation and should be enforced.²²

¹⁷ CCIG info, No 9, October 2016, p. 4. Available at: <https://www.ccig.ch/publication/cciginfo>.

¹⁸ Singapore Convention, *op.cit.*, Article 4(1)(b)(iii).

¹⁹ Swiss Rules of Mediation, *op.cit.*, Article 16(5).

²⁰ Swiss Rules of Mediation, *op.cit.*, Article 17(3).

²¹ Swiss Rules of Mediation, *op.cit.*, Article 17(2).

²² Singapore Convention, *op.cit.*, Article 4(1) (b)(iii).

b. The Certification of Settlement Agreement outside the Framework of the Singapore Convention

The Singapore Convention has not yet been signed by all countries and especially by none of the European countries. It remains to be seen how many countries and how fast they will ratify it. For this reason, it could be feared that the scope of the certification of Settlement Agreement is quite limited, particularly in Europe.

Certificates issued by a reputable institution and attesting that the parties agreed on a given settlement agreement during a mediation might nonetheless prove useful in some jurisdictions, now or in the future. SCAI, for instance, is regularly asked by parties to provide them with certified copies of arbitral awards. Keen to assist the parties in their dispute resolution and to stay ahead of legislative developments and trends, SCAI will provide such certificates of authenticity and certified copies of settlement agreements resulting from Swiss Rules mediation whenever the conditions are met.

Settlement agreements signed before a Swiss notary public are already enforceable in Switzerland and in the Member-States of the Lugano Convention²³ applicable in all EU and AELE countries.²⁴ Aren't the mediation institutions even better placed to attest such acts?

4. The Advisory Council for Mediation

In its essence, mediation is an extremely flexible dispute resolution mechanism in which the parties and the mediator have a lot of freedom with respect to the conduct of the proceedings. Such flexibility could however lead to the parties and mediators losing control over the costs of the mediation.

²³ Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988 (the "Lugano Convention").

²⁴ Settlement agreements signed before a Swiss notary public are registered as authentic instruments which allow overcoming an eventual objection in accordance with the Swiss Federal Law Act on Debt Collection and Bankruptcy. They are considered a final removal of the objection and are enforceable in Switzerland and in all EU and AELE countries; Articles 347 et seq. of the Swiss Civil Procedure Act, Articles 80 et seq. Swiss Federal Law Act on Debt Collection and Bankruptcy, Article 32 et seq. of the Lugano Convention; Caroline Ming, les services de médiation proposés *par la Swiss Chambers' Arbitration Institution*, in Laurent Hirsch/Christophe Imhoos (éds.) *Arbitrage, médiation et autres modes pour résoudre les conflits autrement*, Geneva/Zurich 2018, Schulthess Editions Romandes, pp. 83-92, p. 90. However, if it is only signed by the parties without being certified by a Swiss notary public, the Settlement Agreement is considered a provisional removal of the objection; Articles 347 et seq. of the Swiss Civil Procedure Act and Articles 80 et seq. Swiss Federal Law Act on Debt Collection and Bankruptcy; Caroline Ming, *op.cit.*, p. 90.

One of the advantages of having mediation under the *aegis* of SCAI is that SCAI will provide non-binding guidance over mediator's fees and expenses when requested to do so.²⁵ Moreover, thanks to the data collected, SCAI will establish statistics, notably on the success rates, costs, and duration of mediations administered so that these can be used for educational purposes and to help the parties assess their options and decide on their dispute resolution strategies.

For these educational, development, and guidance purposes, SCAI created the Advisory Council for Mediation (the "Advisory Council"). For the time being, the Advisory Council is comprised of a small number of very experienced mediation practitioners.

5. Mediation and Arbitration

Mediation and arbitration have their own advantages and disadvantages, some shared between the two dispute resolution tools.

A well led mediation process may allow maintaining, restoring or even improving the parties' relationships. In the vast majority of the cases, the parties will respect their commitment and execute the settlement agreement voluntarily. When that is not the case, however, and despite the important contributions of the Singapore Convention and the new Swiss Rules on Mediation, a settlement agreement resulting from mediation does not yet guarantee the same finality and enforceability as an arbitral award whose enforcement is regulated by the 1958 New York Convention,²⁶ ratified by 163 countries,²⁷ and by some arbitration-friendly national laws and courts. Moreover, even good faith and willing parties might not manage to reach a settlement agreement putting an end to the dispute in its entirety; or they may require that a decision be made by a third party in some cases. To resolve their dispute cost and time efficiently, some parties may want to have some issues resolved by mediation (*e.g.*, jurisdiction, deliverables during the arbitral procedure, delimitations of the matter in dispute that needs an external determination) and leave some others for the arbitral tribunal to decide (*e.g.*, technical questions and/or the legal syllogism).

²⁵ Swiss Rules of Mediation, *op.cit.*, Article 24(4).

²⁶ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York the 10 June 1958. It is interesting to remember that it was originally signed only by 10 States.

²⁷ See: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXII-1&chapter=22&clang=_en, accessed on 15 April 2020.

The revised Swiss Rules on Mediation were drafted in view to combine the pros of both mediation and arbitration, allowing the parties to have the “best of both worlds”: the flexibility and the creativity of mediation with the certainty and finality of arbitration.

The parties and their counsel are invited to constantly adapt to the evolution of their case and of the situation. They should consider their options at all stages of the dispute resolution process and may agree anytime to submit their dispute to the other dispute resolution mechanisms available (e.g., to arbitration in case where they are involved in a mediation; to mediation in case they are involved in an arbitration) in application of the Swiss Rules or of any other arbitration or mediation rules.²⁸

Mediation should not be seen as just a pre-trial step. A mediation can be performed prior to, during, alongside, at the end, or even after an arbitration. In order to facilitate the access to mediation for parties already involved in an arbitration, in a litigation, or even just in a dispute, but whose contract does not provide for a mediation under the Swiss Rules of Mediation at any time, SCAI provides a model mediation agreement.²⁹

It is worth noting that none of the communication made and none of the documentation prepared for the purpose of the mediation can be disclosed outside or after the mediation; for instance in subsequent arbitration or litigation proceedings without the written consent of all persons involved in the mediation, except to the extent necessary to enforce a settlement agreement that concludes the mediation or if otherwise required by law.³⁰ Documentary evidence that is shown or produced in mediation may however be subject to later document production requests or be deemed admissible as evidence in certain instances.³¹

²⁸ Swiss Rules of Mediation, *op.cit.*, Articles 18(1) (2) and 19(1) (2); Swiss Rules of International Arbitration, *op.cit.*, Articles 15 (8), 32(3) and 34.

²⁹ See below the proposed agreement to mediate when the parties are already involved in a dispute or problem:

“The parties hereby agree to submit the following dispute to mediation in accordance with the Swiss Rules of Mediation of the Swiss Chambers’ Arbitration Institution:

[brief description of the dispute]

The seat of the mediation shall be... [city] in... [country], although the meetings may be held in... [city] in... [country].

The mediation shall be conducted in ... [specify desired language].”

³⁰ Swiss Rules of Mediation, *op.cit.*, Article 13(1).

³¹ These are notably to be checked, on a case by case basis: applicable local rules of ethic, international private laws, domestic laws, and the IBA Rules on the Taking of Evidence in Internal Arbitration 2010 of the International Bar Association, in particular Articles 3, 9.2(b), and 9.3.

In order to increase finality and enforceability of a settlement agreement reached in mediation, parties may ask an already composed arbitral tribunal to ratify the settlement agreement in a consent award. Parties should, however, be aware that they cannot initiate an arbitration if the dispute was already resolved in a settlement agreement - in the absence of a dispute, no arbitral tribunal can be constituted and a settlement agreement cannot be submitted to arbitration for ratification anymore.

To encourage the parties to make full use of all the services offered by SCAI and the opportunities those represent for them, SCAI halves the mediation registration fees in cases where parties initiate it after having started arbitration under the Swiss Rules.³²

Moreover, in view of reducing the number of pathological clauses and of parties having to face the “worst of both worlds”, SCAI provides model arbitration, mediation, Med-Arb, Arb-Med³³ and Arb-Med-Arb³⁴ clauses on SCAI website.

³² Swiss Rules of Mediation, *op.cit.*, Article 1.8 Appendix B.

³³ See below the proposed SCAI Arb-Med Clause:

“Any dispute, controversy, or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers’ Arbitration Institution in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.

The number of arbitrators shall be ... [“one”, “three”, “one or three”];

The seat of the arbitration shall be ... [name of a city in Switzerland, unless the parties agree on a city in another country];

The arbitral proceedings shall be conducted in ... [insert desired language].

Notwithstanding the above, the parties may agree at any time to submit the dispute to mediation in accordance with the Swiss Rules of Mediation of the Swiss Chambers’ Arbitration Institution.”

³⁴ See below the proposed SCAI Arb-Med-Arb Clause:

“Any dispute, controversy or claim arising out of, or in relation to, this contract, including the validity, invalidity, breach, or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers’ Arbitration Institution (“SCAI”) in force on the date on which the Notice of Arbitration is submitted in accordance with these Rules.

Following the constitution and receipt of the case file, the arbitral tribunal shall stay the arbitration proceedings and invite the Secretariat of the Arbitration Court to initiate mediation in accordance with the Swiss Rules of Commercial Mediation of SCAI in force on the date on which the Notice of Arbitration was submitted. However, the arbitral tribunal may proceed with the arbitration if the Respondent does not submit an Answer to the Notice of Arbitration within the deadlines granted.

If the dispute has not been fully settled by mediation within 60 days from the initiation of the mediation by the Secretariat of the Arbitration Court, the arbitration proceedings

The Arb-Med-Arb procedure possesses several advantages, provided the parties remain careful in their drafting and management of the process. Since the procedure begins as an arbitration, the limitation period is interrupted when the arbitral tribunal is constituted. The arbitration proceedings will subsequently be stayed and the mediation will begin. Thanks to the preparation and exchange of briefs during the initial arbitration phase, the parties enter in the mediation with more information than they would often have when engaging directly in mediation. Furthermore, the parties are more likely to have discovered already the weaknesses in their own cases and may be more inclined to consider carefully all their options and settle their dispute. Sophisticated attorneys will however proceed with the same care in the preparation of stand-alone mediation than in the preparation of arbitral or litigation procedures.

One of the main advantages of the Arb-Med-Arb combination is that the parties may obtain an enforceable arbitral award in addition to their settlement agreement. Having at their disposal an already constituted arbitral tribunal, the parties may request anytime, and without further delay, the arbitral tribunal to resume the arbitration proceeding and rule on the outstanding issues or, when all are settled, to issue an enforceable consent award.

6. The Important Role of Counsel

Counsel has several duties and roles to play: first and foremost, their main duty is to help their client resolve their dispute in the most qualitative, cost-, and time-efficient way and to the satisfaction of their client. Moreover, counsel play an important role in the gathering and structuring of the relevant information and evidence as well as in investigating, discussing, analyzing, and guiding the client in the understanding of the complete scope of the clients' needs and interests. Further, counsel should consider all the procedures and processes available (mainly negotiation, mediation, arbitration, and litigation).

shall resume. Any settlement reached in the course of the mediation, whether full or partial, shall be referred to the arbitral tribunal who shall either issue an order for the termination of the arbitral proceedings or, if requested by the parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms.

The seat of the arbitration and mediation shall be ... [city], [country].

The arbitration and mediation shall be conducted in ... [specify desired language].

The number of arbitrators shall be ... ["one", "three", "one or three"].

During mediation, the counsel's role is to provide appropriate information and evidence to the appropriate stakeholders (client, counterparty, mediator, experts, etc.), accompany the client during the meetings, constantly assess the new opportunities, issues, and risks, while also participate in an in-depth analysis of the overall situation. Counsel should understand not only the position, rights and obligations of the client, but also the fundamental needs and interests at stake for all the stakeholders so that he can brainstorm first with the client, then with the further stakeholders, to ensure that all interest-based solutions have been considered.

Eventually, counsel should discuss and help client at every stage of the dispute resolution process to ponder the opportunities, costs, and risks of all adversarial proceedings available, of termination of relationships, and of a settlement. Counsel should make sure that he is involved in the careful drafting of enforceable settlement agreement.

Conclusion

The 2019 revised Swiss Rules of Mediation will provide additional support and clarity to businesses and entrepreneurs based in Switzerland or abroad, operating in countries having signed the Singapore Convention or not.

Together with the SCAI's various model arbitration and mediation clauses, and with the Swiss Rules of International Arbitration, the revised Rules will maintain SCAI as one of the most reliable dispute resolution institution worldwide, for parties who are keen to select the most qualitative and efficient tools to resolve their potential future disputes cost, quality and time efficiently whether that is through mediation and/or arbitration proceedings. The revised Rules demonstrate SCAI's willingness to keep providing the most up-to-date, reliable, confidential, and independent dispute resolution services to foster companies' good relationships and development in view of achieving, ultimately, the most sustainable worldwide economic growth possible.

With the revised Rules, SCAI has reduced the risk of non-enforceability of settlement agreement resulting from mediation to a minimum. It is now in the hands of the parties, counsel, politicians, legislators and courts to further assist the economy and reduce the enforceability risk, notably by knowing and using all the existing tools (in particular the model mediation and arbitration clauses), rules and laws, while at the same time considering and, where appropriate, encouraging legislative evolutions (*e.g.*, signing and ratifying the Singapore Convention, amending

local laws in view of granting evidential value to institutional certificates of mediation and to institutionally certified settlement agreements resulting from mediation, or to grant the initiation of institutional mediation process the effect of suspending time-bar deadlines).

SCAI hopes now that the benefits of mediation will be better understood, and that, with the addition of the new tools provided by the 2019 revised Rules of Mediation, these means of dispute resolution will be more often and more consistently utilized, reinforcing Switzerland's position not only as the epicenter of arbitration developments, but also that of mediation. Despite the fact that Switzerland has not yet signed the Singapore Convention, companies based in States Parties of the Singapore Convention, such as China, United States and India, might be well advised to still consider Switzerland as the competent forum to solve their disputes through mediation and arbitration, this in particular in view of Switzerland's neutrality as well as of its political and economic stability.³⁵

³⁵ Laurent Hirsch, Jeremy Lack, Birgit Sambeth Glasner, *New Swiss Rules of Mediation from SCAI*, RDAI/IBLJ, N.5, 2019, pp. 545-547, p. 545.

Caroline MING, Christian IOVENE, *Advantages and Benefits of the Revised Swiss Rules of Mediation 2019 – in Light and in Line with the Singapore Convention*

Summary

Anticipating the 7 August 2019 signature by 46 States of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the “Singapore Convention”), the Swiss Chambers’ Arbitration Institution issued a revised version of the Swiss Rules of Mediation on 1 July 2019. While both sets of rules aim to facilitate the enforcement of settlement agreements resulting from mediation, the revised Swiss Rules of Mediation also provide their users with new features such as, notably, a simplified procedure for the designation of a mediator, the issuance of institutional certificates and authentications, the creation of an Advisory Council for Mediation and improved links between arbitration and mediation.

The purpose of this article is to expose the advantages and benefits of the revised Swiss Rules of Mediation and explain how users can anticipate and fully benefit from these and from the Singapore Convention which will enter into force on 12 September 2020.

Submission of Manuscripts

Manuscripts and related correspondence should be sent to the Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within eight to twelve weeks. Manuscripts may be drafted in German, French, Italian or English. They should be submitted by e-mail to the Editor (**mscherer@lalive.ch**) and may range from 3,000 to 8,000 words, together with a summary of the contents in English language (max. ½ page). The author should submit biographical data, including his or her current affiliation.

Aims & Scope

Switzerland is generally regarded as one of the World's leading place for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced by many of the world's best-known arbitration practitioners. The Statistical Report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983 the Bulletin has carved a unique niche with its focus on arbitration case law and practice worldwide as well as its judicious selection of scholarly and practical writing in the field. Its regular contents include:

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- Leading cases of the Swiss Federal Supreme Court
- Leading cases of other Swiss Courts
- Selected landmark cases from foreign jurisdictions worldwide
- Arbitral awards and orders under various auspices including the ICC and the Swiss Chambers of Commerce (“Swiss Rules”)
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