Revised Swiss Rules of Mediation entered into force on 1 July 2019

31.07.2019

Revised Swiss Rules of Mediation in a nutshell

- **Rules shorter and easier to use**
- **Introduction of a simplified designation procedure for mediators in certain cases**
- **Facilitation of enforcement of settlement agreements**
- **Establishment of the SCAI Advisory Council for Mediation for disputes about the mediator's fees and expenses**

Introduction

Switzerland has a long-standing tradition in mediation and diplomacy. Some Swiss chambers of commerce had established mediation rules to facilitate the settlement of disputes already several decades ago. In 2007, the Swiss Chambers' Arbitration Institution ("SCAI") harmonised the regional mediation rules and introduced the Swiss Rules of Commercial Mediation ("2007 Mediation Rules").

For the first time since enactment, the 2007 Mediation Rules have now been revised. At the same time they were renamed Swiss Rules of Mediation ("2019 Mediation Rules"). The word "Commercial" has been deleted in the title to emphasise that the 2019 Mediation Rules can be used for commercial and non-commercial disputes alike. The 2019 Mediation Rules entered into force on 1 July 2019.

Substantial parts of the 2007 Mediation Rules have been shortened, simplified and clarified to increase user friendliness without changing the rules' basic functionality. The 2019 Mediation Rules now contain only 26 articles compared to the 31 articles in the 2007 Mediation Rules. The 2019 Mediation Rules are compatible with the United Nations Convention on International Settlement Agreements resulting from Mediation ("Singapore Convention on

Pestalozzi Rechtsanwälte AG
Feldeggstrasse 4
CH-8008 Zürich
T +41 44 217 91 11
zrh@pestalozzilaw.com

Pestalozzi Avocats SA
Cours de Rive 13
CH-1204 Genève
T +41 22 999 96 00
gva@pestalozzilaw.com

pestalozzilaw.com

Mediation"), which has not yet entered into force.

Scope of application

The 2019 Mediation Rules apply to all mediations where the parties have expressly agreed to mediate under said rules either by prior agreement (e.g. in a mediation clause or a multi-tiered arbitration clause) or after a dispute has arisen, Article 1 (1) of the 2019 Mediation Rules. The 2019 Mediation Rules define "mediation" as follows:

Mediation is a method of dispute resolution whereby the parties attempt to reach an amicable settlement of their dispute or avoid future conflicts with the assistance of a neutral third party, the mediator. The mediator facilitates the exchange of information and perspectives between the parties and encourages them to explore solutions that meet their needs and interests. Unless required by the parties, the mediator refrains from offering his or her own views (as would an expert), or from making proposals (as would a conciliator).

Compared to the 2007 Mediation Rules, the revised 2019 Mediation Rules clarify that a mediator can also express his or her own views and/or make a proposal if requested by the parties. Unlike an arbitrator, a mediator has no adjudication powers, Article 10 (1) of the 2019 Mediation Rules.

As was the case already under the old rules, a party (or all parties) can initiate mediation by submission of a request for mediation ("Request") to the SCAI Secretariat ("Secretariat"). Under the 2019 Mediation Rules, the various provisions concerning initiation of the mediation are now clarified and streamlined in Article 2.

Interrelation of arbitration and mediation

Mediation is frequently supplemented or succeeded by arbitration. Both the 2007 and 2019 Mediation Rules emphasise this close link between mediation and arbitration.

According to Article 19 of the 2019 Mediation Rules, which only underwent editorial changes, any party or the arbitrator may suggest during SCAI arbitrations that the parties seek to amicably resolve their dispute by recourse to mediation. No comparable provision exists in the Swiss Rules of International Arbitration ("Swiss Arbitration Rules") but it is undisputed that arbitrators or the parties can suggest mediation at any time during an arbitration under the Swiss Arbitration Rules.

Already the old mediation rules allowed the mediator to hold separate meetings (caucuses) with the parties, when appropriate. Such meetings are confidential unless, as it is now clarified in Article 11 (3) of the 2019 Mediation Rules, "all participants in the separate meetings" authorised the mediator to disclose such information (the 2007 Mediation Rules did not specify whose consent was required for disclosure).

The possibility to hold separate and confidential meetings is one of the reasons why a mediator is usually disqualified to act subsequently as an arbitrator. Article 13 (3) of the 2019 Mediation Rules clarifies that, unless the parties expressly agree otherwise, the mediator can no longer act as arbitrator "in any subsequent proceedings relating to the same dispute or involving any of

the parties to the mediation after the Request has been validly submitted to the Secretariat".

Simplified procedure for designating a mediator

New is the simplified procedure for designation of a mediator pursuant to Article 5 of the 2019 Mediation Rules. The simplified designation procedure applies if the parties explicitly agree on the simplified procedure (opt-in), or if they do not object and the amount in dispute is less than CHF 50,000 (opt-out).

In the simplified designation procedure, the Secretariat will confirm the mediator jointly appointed by the parties pursuant to Article 6 of the 2019 Mediation Rules (as the Secretariat would do in the regular designation procedure) or appoint one mediator directly taking into account the parties' preferences or desired qualifications of the mediator, i.e. without submitting a list of mediators to the parties prior to the appointment, Article 5 (2) of the 2019 Mediation Rules. It is hoped that the simplified designation procedure will lead to a faster designation of the mediator and ultimately to a faster settlement of the mediated dispute.

Certified copies and certificates of authenticity of settlement agreement

Another new feature of the revised 2019 Mediation Rules is that the Secretariat issues certified copies and certificates of authenticity of the settlement agreement. According to Article 17 (2) of the 2019 Mediation Rules, the Secretariat issues certified copies of the settlement agreement upon request by the parties if provided with a signed original hard copy of the settlement agreement. Furthermore, pursuant to Article 17 (3) of the 2019 Mediation Rules, the parties may request the Secretariat to certify the authenticity of the settlement agreement. The Secretariat will issue a certificate of authenticity if the mediator confirms in writing that he or she witnessed the parties signing the settlement agreement or if the parties have signed the settlement agreement at the Secretariat (presumably in presence of the Secretariat).

The new provisions concerning the certified copies and certificate of authenticity have been included to facilitate the enforcement of mediated settlement agreements, in particular within the ambit of the Singapore Convention on Mediation (not yet in force). The Singapore Convention on Mediation provides cross-border enforcement of mediated settlement agreements concluded in writing to resolve a commercial dispute. The Singapore Convention on Mediation gives effect to mediated settlement agreements in a similar way to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards for arbitral awards. It is expected that the first countries will sign the Singapore Convention on Mediation on 7 August 2019.

Article 4 of the Singapore Convention on Mediation requires that a party seeking to enforce a mediated settlement agreement must provide inter alia a signed copy of the international settlement agreement and evidence that the international settlement agreement resulted from mediation (such as the mediator's signature on the settlement agreement, a document signed by the mediator indicating that the mediation was carried out, and/or an attestation by the institution that administered the mediation). The certified copies and certificates of authenticity of the settlement agreement provided by the Secretariat according to Article 17 of the 2019 Mediation Rules are designed to fulfill these formal requirements of the Singapore Convention on Mediation.

SCAI Advisory Council for Mediation

The revised 2019 Mediation Rules introduce a SCAI Advisory Council for Mediation. Article 24 (4) of the Mediation Rules provides that disagreements regarding the mediator's fees and/or expenses shall be submitted to the SCAI Advisory Council for Mediation. It remains to be seen in the future whether the Advisory Council will also be responsible for other disagreements between the mediator and the parties (e.g. regarding conduct of the mediation).

Contributors: Dr. Florian Mohs (Partner), Lukas Rusch (Associate) and Luca Bossard (Junior Associate)

Florian Mohs

Partner
Attorney at law, Dr. iur., LL.M.
Head Arbitration

Pestalozzi Attorneys at Law Ltd
Feldeggstrasse 4
8008 Zurich
Switzerland
T +41 44 217 92 21
florian.mohs@pestalozzilaw.com

