

Streamlining the Swiss Rules of Mediation

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Dispute Resolution analysis: Florian Mohs, partner, and Lukas Rusch, associate, at Pestalozzi in Zurich, explain the Swiss Chambers' Arbitration Institution's decision to replace the 2007 Swiss Rules of Commercial Mediation with the 2019 Swiss Rules of Mediation and consider how the new rules sit within international mediation more broadly.

What are the 2019 Swiss Rules of Mediation and what is the scope of these revised rules?

The 2019 Swiss Rules of Mediation provide a legal framework to resolve disputes by way of mediation and to reach an amicable settlement with the assistance of a neutral third party, the mediator. They apply to all mediations where the parties have expressly agreed to mediate under said rules either by prior agreement (eg in a mediation clause or a multi-tiered arbitration clause) or after a dispute has arisen, and can be used for commercial and non-commercial disputes alike.

What impact did the previous rules (the 2007 Swiss Rules of Commercial Mediation) have?

Over the last 12 years, the 2007 Swiss Rules of Commercial Mediation have helped parties to find business and interest-oriented solutions of their disputes. The success rate of mediation is very high. Over 70% of cases mediated under the 2007 Swiss Rules of Commercial Mediation were resolved with an amicable settlement.

Although the number of cases resolved by mediation under the 2007 Swiss Rules of Commercial Mediation has increased over the years, mediation proceedings are still in the shadow of arbitration in Switzerland. In 2015, for instance, only seven mediation cases were submitted to the Swiss Chambers' Arbitration Institution (SCAI), compared to 100 arbitration cases.

What are the key changes introduced by the revised rules?

The 2019 Swiss Rules of Mediation have been shortened, simplified and clarified to improve user-friendliness.

A new feature is the simplified procedure for designating the mediator (see Article 5). The simplified procedure applies whenever the parties explicitly agree on it (opt-in) or if the amount in dispute is less than CHF 50,000 and the parties do not object (opt-out). In the simplified procedure, the Secretariat of the SCAI confirms the mediator jointly appointed by the parties or directly appoints one, taking into account the preferences of, or the qualifications desired by, the parties. The simplified procedure may lead to a quicker designation of the mediator and ultimately to a faster settlement of the dispute.

Another innovation is the introduction of an Advisory Council for Mediation, which can help to settle a dispute over the mediator's fee (see Article 24(4)). It will be interesting to see whether the Advisory Council for Mediation will also be responsible for other potential conflicts, for instance relating to procedural matters.

Furthermore, under the revised rules, the Secretariat of the SCAI can issue certified copies and certificates of authenticity of the settlement agreement in order to facilitate the enforcement of a mediated settlement agreement (see Articles 17(2) and 17(3)).

How are the revised rules intended to interact with the new Singapore Mediation Convention? Were the changes made to ensure compatibility with that convention?

One of the main goals of the 2019 Swiss Rules of Mediation was to make them compatible with the Singapore Mediation Convention.

When the Singapore Mediation Convention becomes effective, it will govern the cross-border enforcement of settlement agreements resulting from mediation in contracting states, similar to the New York Convention for arbitral

awards. The Singapore Mediation Convention requires a party seeking the enforcement of a mediation agreement to submit, inter alia, a signed copy of the settlement agreement and evidence that the settlement agreement has resulted from mediation.

As noted above, the 2019 Swiss Mediation Rules provide for such certificates (see Articles 17(2) and 17(3)). Upon request by the parties, the Secretariat of the SCAI can issue certified copies of the settlement agreement if provided by the mediator with a signed original hard copy of the settlement agreement. Furthermore, the Secretariat may 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 the presence of the Secretariat).

What is the expected impact of the revised rules?

The 2019 Swiss Rules of Mediation will contribute to the growing popularity of mediation and will strengthen Switzerland as a hub for mediation. The 2019 Swiss Rules of Mediation are among the first mediation rules worldwide to anticipate the Singapore Mediation Convention. In particular, the 2019 Swiss Rules of Mediation provide the possibility to request certified copies and copies of authenticity of the settlement agreement to facilitate its enforcement.

The Singapore Mediation Convention is the most significant development in international mediation in recent years. Forty-six countries have already signed the Convention, including the US, and it will come into effect once at least three countries have ratified it.

If successful, the Singapore Mediation Convention could significantly increase the attractiveness of mediation by improving legal certainty and by providing cross-border enforceability of mediated settlement agreements. However, the impact of the Singapore Mediation Convention on cross-border use of mediation will most likely not be immediate. It should be noted that it took the New York Convention on Arbitration, which was a model for the Singapore Mediation Convention, several years to develop the popularity for international arbitration it enjoys today.

What impact might Brexit have on mediation?

The impact Brexit may have on mediation (if any) will most likely be limited to the UK. Within the EU, there are rules in place that support cross-border mediation, such as the [Directive 2008/52/EC](#), the Mediation Directive on certain aspects of mediation in civil and commercial matters. The consequences of Brexit on cross-border mediations will depend on whether and to which extent these rules will still be applicable in the UK post-Brexit.

How are the revised rules designed to interact with (Swiss Rules) arbitration?

The 2019 Swiss Rules of Mediation emphasise the close relationship between mediation and arbitration. A mediation under the 2019 Swiss Rules of Mediation can be conducted before or during an arbitration proceeding. Mediation is generally considered to be a faster and cheaper way of dispute resolution and as such can be a useful tool to control the length and costs of arbitration proceedings.

The 2019 Swiss Rules of Mediation can be combined with an arbitration proceeding under the Swiss Rules of Arbitration. The parties to a mediation under the 2019 Swiss Rules of Mediation may at any time during the mediation refer their dispute to the SCAI for arbitration under the Swiss Rules of Arbitration (see Article 18(1)). Conversely, the 2019 Swiss Mediation Rules provide that a party or arbitrator may at any time during an arbitration procedure suggest conducting mediation (see Article 19(1)). The registration fee for mediation will be divided by two in case a Notice of Arbitration was already filed (see Appendix B, paragraph 1.8, of the [2019 Swiss Rules of Mediation](#)).

What do the revised rules say about mediators acting as arbitrators in relation to same dispute (ie Article 13)?

The 2019 Swiss Rules of Mediation clarify that a mediator may not act as an arbitrator in subsequent arbitration proceedings, unless the parties have explicitly agreed otherwise (see Article 13(3)). A mediator can hold confidential

separate meetings (caucuses) with the parties when appropriate to facilitate a settlement. Such meetings can conflict with the independency and impartiality requirements in international arbitration where arbitrators must generally avoid any unilateral communication regarding the case with any party.

Do you think the revised mediation rules will increase the popularity of Swiss Rules arbitration?

Mediation under the 2019 Swiss Rules of Mediation and arbitration under the Swiss Rules of Arbitration are closely linked. The 2019 Swiss Rules of Mediation will help to make mediation for businesses and investors more attractive in Switzerland, which will ultimately also benefit and further increase the popularity of arbitration under the Swiss Rules of Arbitration.

Are there any other recent or forthcoming developments in Swiss arbitration or mediation that international dispute resolution practitioners should be aware of?

In 2018, the Swiss Federal Council released the report and the draft Bill concerning the revision of the Swiss international arbitration law (Chapter 12 of the Swiss Private International Law Act). The proposed revision of the Swiss international arbitration law is designed to implement key elements of the Swiss Federal Supreme Court's jurisprudence, to clarify open issues in international arbitration, to strengthen party autonomy, and to enhance the overall user-friendliness of the Swiss legal framework in international arbitration.

For instance, the revised Bill contains a more simple and modern provision concerning the form requirements for arbitration agreements, by providing that an arbitration agreement must be made in writing or in any other form which permits it to be evidenced by a text (such as e-mail). Furthermore, the new Swiss international arbitration law contains express provisions on the correction, explanation and amendment, and revision of an arbitral award. Another proposed change increasing user-friendliness is that legal briefs to the Swiss Federal Supreme Court may be submitted in English (in addition to one of the official Swiss languages of German, French or Italian).

We expect that the revision will become effective in 2020 or 2021.

Interviewed by Jenny Rayner.

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