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# Fundamental Changes Introduced by the New Swiss Rules of Mediation After the 2019 Revision – New Regulations Compatible with Singapore Convention on Mediation

2019 Revizyonundan Sonra Yeni İsviçre Arabuluculuk Kurallarının Getirdiği Temel Değişiklikler-  
Singapur Arabuluculuk Sözleşmesi ile Uyumlu Yeni Düzenlemeler

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### Abstract

Mediation, as an alternative dispute resolution method, is widely preferred by parties with disputes in many countries. For this reason, in relation to alternative dispute resolution methods including mediation, both in Anglo-American Law and in Continental European Law, various technical and legal arrangements have been made. In Swiss Law, mediation gained legal ground when the Swiss Federal Code of Civil Procedure Law became effective on the 1<sup>st</sup> of January, 2011. Accordingly, in Switzerland mediation takes place as per articles 213 to 218 of the Federal Swiss Civil Procedures law. While developments related to *Ad Hoc mediation* were specified in Swiss law, mediation rules were also foreseen at the various Institutional arbitration centers. Accordingly, the Swiss Chambers' Arbitration Institution accepted mediation rules for the first time in addition to the arbitration rules in 2007. In this way, the Swiss Rules of Commercial Mediation, arranged by the Swiss Chambers were provided for those making applications in the year 2007. Furthermore, on the 1<sup>st</sup> of July 2019, the Swiss Chambers' Arbitration Institution revised the Swiss Rules of Commercial Mediation, which they accepted in 2007. Hence, the Swiss Rules of Mediation which were revised as of the 1<sup>st</sup> of July 2019, replaced the Swiss Commercial Mediation Rules of year 2007. In the revision of the Swiss Rules of Mediation on the 1<sup>st</sup> of July 2019, developments related to the *UNCITRAL United Nations Convention on International Settlement Agreements Resulting from Mediation* approved on the 25<sup>th</sup> of June, 2018 have become effective. Following the 2019 revision, the Swiss Rules of Mediation have become one of the regulations bringing out rules that are in conformity with the developments foreseen in the Singapore Convention on Mediation. In our study, the aim was to reveal the fundamental changes brought up with the application of the Swiss Rules of Mediation since the 1<sup>st</sup> of July 2019.

### Keywords

Mediation, Institutional Mediation, Swiss Rules of Mediation (2019), Swiss Chambers' Arbitration Institution, Singapor Convention on Mediation, Mediation-Arbitration

### Öz

Alternatif uyuşmazlık çözüm yöntemi olarak arabuluculuk, pek çok ülkede uyuşmazlığa düşen taraflar arasında yaygın bir şekilde tercih edilmektedir. Bu sebeple, arabuluculuğun da dahil olduğu alternatif uyuşmazlık çözüm yöntemlerine ilişkin olarak, gerek Anglo-Amerikan Hukukunda gerekse de Kıta Avrupası hukuklarında çeşitli teknik ve hukuksal düzenlemelerin yapılması yoluna gidilmiştir. İsviçre Hukukunda arabuluculuk 1 Ocak 2011 tarihinde İsviçre Federal Medeni Usul Kanununun (*Schweizerische Zivilprozessordnung-SchwZPO*) yürürlüğe girmesi ile hukuksal bir zemine kavuşmuştur. Buna göre, İsviçre'de arabuluculuk İsviçre Federal Medeni Usul Kanunu'nun 213 ile 218'inci maddeleri arasında öngörülmektedir. İsviçre hukukunda *Ad Hoc* arabuluculuğa ilişkin gelişmeler yaşanırken çeşitli kurumsal tahkim merkezlerinin nezdinde

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*arabuluculuk* kuralları da mevcuttu. Buna göre, İsviçre Odaları Tahkim Kurumu 2007 yılında tahkim kurallarına ek olarak ilk kez arabuluculuk kuralları da kabul etmiştir. Böylelikle, 2007 yılında İsviçre Odaları Tahkim Kurumunun düzenlediği İsviçre Ticari Arabuluculuk Kuralları uygulamacıların hizmetine sunulmuştur. Bununla birlikte, İsviçre Odaları Tahkim Kurumu, 2007 yılında kabul ettiği İsviçre Ticari Arabuluculuk Kurallarını 1 Temmuz 2019 tarihinde revize etmiştir. 1 Temmuz 2019 tarihinde İsviçre Arabuluculuk Kurallarının revize edilmesinde 25 Haziran 2018 tarihinde onaylanan UNCITRAL Arabuluculuktan Doğan Milletlerarası Anlaşma Belgelerine Dair Birleşmiş Milletler Sözleşmesi hakkındaki gelişmeler de etkili olmuştur. Buna göre, 7 Ağustos 2019 tarihinde imzaya açılan arabuluculuk yoluyla elde edilen milletlerarası anlaşma belgelerinin icra edilebilirliğini kolaylaştırmayı planlayan Singapur Sözleşmesi hakkındaki gelişmeler dikkate alınarak arabuluculuk faaliyetinin sona ermesi ve anlaşma belgesinin sertifikalandırılması hakkında yeni kurallar getirilmiştir. 2019 revizyonundan sonra İsviçre Arabuluculuk Kuralları Singapur Konvansiyonunda öngörülen gelişmelerle uyumlu kurallar getiren ilk düzenlemelerden birisi olmuştur. Bu sebeple çalışmamızda, 1 Temmuz 2019 tarihinden itibaren uygulanan İsviçre Arabuluculuk Kuralları ile getirilen temel değişikliklerin ortaya konulması amaçlanmıştır.

#### **Anahtar Kelimeler**

Arabuluculuk, Kurumsal Arabuluculuk, İsviçre Arabuluculuk Kuralları (2019), İsviçre Odaları Tahkim Kurumu, Singapur Arabuluculuk Sözleşmesi, Arabuluculuk-Tahkim (*Mediation-Arbitrarion*)

## Fundamental Changes Introduced by the New Swiss Rules of Mediation After the 2019 Revision: New Regulations Compatible with the Singapore Convention on Mediation

### I. Introduction

In recent years, globalization of international trade and the complexity of international transactions among parties have caused an evolution of relations based on contracts<sup>1</sup>. As a result of this, for the resolution of problems originating from relations that become complex, the interest shown in methods offering alternatives to government judgments has gradually increased<sup>2</sup>.

*Mediation* is an alternative dispute resolution method with which parties try to resolve disputes amicably or try to avoid future disagreements with the help of a mediator as an unbiased third party<sup>3</sup>. Mediation<sup>4</sup>, as an alternative dispute resolution method<sup>5</sup>, is widely

1 Julien Burda, 'The Participation of Third Parties to Arbitration under Swiss Law' (2011) 2011 International Business Law Journal 515. David W Plant, 'Mediation in International Commercial Arbitration: Some Practical Aspects' (1998) 4 ILSA Journal of International & Comparative Law 329.

2 Paul D Emond, 'Introduction: The Practices of Alternative Dispute Resolution' (1998) 36 Osgoode Hall Law Journal, The Practices of Alternative Dispute Resolution (ADR) 617.

3 Kent L Brown, 'Confidentiality in Mediation: Status and Implications', (1991) 1991 Journal of Dispute Resolution (J Disp Resol) 308; Serpil Işık, 'Mediation As An Alternative Dispute Resolution Method and Mediation Process in Turkish Law System: An Overview' (2017) 65 Annales de la Faculté de Droit d'Istanbul 55 et seq.; Mindy D Rufenacht, 'The Concern over Confidentiality in Mediation – An in – Dept Look at the Protection Provided by the Proposed Uniform Mediation Act' (2000) 2000 Journal of Dispute Resolution (J Disp Resol) 113; John P McCrory, 'Confidentiality in Mediation of Matrimonial Disputes' (1988) 51 Modern Law Review (Mod L Rev) 442; Jacqueline Durand, 'The Institutionalizing of Mediation and Its Effect on Unrepresented Parties: Is Justice Really the Goal of Court-Mandated Mediation' (2016) 29 Georgetown Journal of Legal Ethics (Geo J Leg Ethics) 976; Vidur Dhawan, 'Commercial Mediation in the UAE and the Laws Concerning Mediation' (2019) 6 Court Uncourt 38. There is no accepted universal definition of mediation. There are various definitions in the doctrine about the mediation, which is applied alternatively to the resolution of the dispute between the parties, by an alternative. For various definition of mediation, see Natalia M Gren, 'The Principles of Mediation' (2016) 2016 Journal of Eastern European Law (JE Eur L) 75-79; Thomas O Main, 'Mediation: An Unlikely Villain' (2019) 34 Ohio State Journal on Dispute Resolution 556; Barbara J Dawson, 'Seeking Success in International Mediation', (2016) 42 Litigation (Litig) 18; Bradley C Nahrstadt, 'The Defence Perspective on Mediation' (2016) 83 Defense Counsel Journal 68; Amos Gabrieli, Nourit Zimerman and Michal Alberstein, 'Authority-Based Mediation' (2018) 20 Cardozo Journal of Conflict Resolution 37; Elif Kısmet Kekeç, *Arabuluculuk Yoluyla Uyuşmazlık Çözümünde Temel Aşamalar ve Taktikler* (3th edn, Adalet 2016) 23. There are also several definitions of mediation in positive regulations. For example, in Turkish Law, a definition related to mediation is made in article 2 of the Law on Mediation in Civil Disputes (Işık, 'Mediation' (n 3) 39). In addition, the European Judicial System (EJS) defines mediation as follows: "*Mediation is a voluntary non-binding private dispute resolution process in which a neutral and independent person assists the parties in facilitating the discussion between the parties in order to help them to resolve their difficulties and reach an agreement.*". See generally about mediation: Nevhis Deren-Yıldırım, 'Arabuluculuk Kurumuna İlişkin Bazı Düşünceler' (2008) in Arabuluculuk Kanunu Tasarısı-Eleştiriler-Sempozyum Notları (Istanbul Barosu Yayını) 81-99; Muhammet Özkes, 'Uyuşmazlık Çözüm Yolları İçinde Arabuluculuk ve Bir Düzenleme Önerisi' 2006 (7) Hukuki Perspektifler Dergisi (HPD) 40-45; Namli M., 'Avrupa Adalet Divanı ve Avrupa İnsan Hakları Mahkemesi Kararları Işığında İş Uyuşmazlıklarında Zorunlu Arabuluculuğun Mahkemeye Erişim Hakkı ile İlişkisi' (2018) 15 Legal İş ve Sosyal Güvenlik Hukuku Dergisi 1295-1327; Süha Tanrıver, 'Arabuluculuk ve Uzlaştırma Kavramları, Aralarındaki Temel Farklılıklar ve Arabuluculuk Kurumuna Duyulan Tepkiler ya da Oluşturulan Dirençler Sosyolojik Açından İrdelenmesi ve Değerlendirilmesi' in Frat Öztan'a Armağan (2010) 2025-2036.

4 Mediation is a concept whose origin is the word "*mediare*" in Latin and meets the meanings of "*intervening*" and "*finding the middle*" (Gülğün İldir, *Alternatif Uyuşmazlık Çözümü (Medeni Yargıya Alternatif Yöntemler)* (1th edn, Seçkin 2003) 78, fn. 2).

5 Alternative dispute resolution methods are methods that allow parties with disputes to resolve their disputes without having to sue (Heiner Eiholzer, *Die Streitbeilegungsabrede (Ein Beitrag zu alternativen Formen der Streitbeilegung, namentlich zur Mediation)* (Universitätverlag 1998) 3).

preferred among parties having disputes in many countries<sup>6</sup>. For this reason, regarding alternative dispute resolution methods including mediation, various technical and legal arrangements have been made in both Anglo-American law and in Continental European laws<sup>7</sup>. In this way, mediation and other alternative dispute resolution methods became institutionalized<sup>8</sup>.

With the effect of these ongoing developments, various steps have been taken for various arrangements aiming to make alternative methods to judgments in classical government courts become more effective within Swiss law<sup>9</sup>. Hence, as the Federal Swiss Civil Procedure Code related to Swiss law (*Schweizerische Zivilprozessordnung*) (SchwZPO) became effective on 1 January 2011, mediation attained legal grounds at the federal level for the first time<sup>10</sup>. Accordingly, regulations related to mediation have been arranged in the articles numbered from 213 to 218 in the Federal Swiss

- 6 Durand (n 3) 976; Noble T Foster and Selden Prentice, 'The Promise of Confidentiality in Mediation: Practitioners' Perceptions' (2009) 2009 Journal of Dispute Resolution 163; Lawrence R Freedman and Michael L Prigoff, 'Confidentiality in Mediation: The Need for Protection' (1986) 2 Ohio State Journal on Dispute Resolution (Ohio St J on Disp Res) 37; Alison Jaime Lee and Carl Giesler, 'Confidentiality in Mediation' (1998) 3 Harvard Negotiation Law Review 285; Mustafa Serdar Özbek, 'Avrupa Konseyi Arabuluculuk Yönergesi Önerisi' Ankara Üniversitesi Hukuk Fakültesi Dergisi (AÜHF), (2007) 56(1) 187. Mediation, primarily its roots in China and Japan, came to the agenda after American researchers' studies on the traditional dispute resolution forms of the Far East after the Second World War and since the mid-1960s (Seda Özmumcu, *Uzak Doğu'da Arabuluculuk ile Türk Hukuk Sisteminde Arabuluculuk Kurumuna Genel Bir Bakış* (3th edn, On İki Levha 2013) 274).
- 7 Lee and Giesler (n 6) 285; Işık, 'Mediation' (n 3) 58; Christof Schwenkel, 'Confidence in Alternative Dispute Resolution: Experience from Switzerland' (2014) 6 International Journal for Court Administration (IJCA) 37; Mustafa Serdar Özbek, 'Avrupa'da Arabuluculuğun İlkeleri ve Uygulanması' in Prof. Dr. Özer Seliçi'ye Armağan (Seçkin 2006) 441. In the United States (USA), Continental European Law and the United Kingdom (UK), many alternative dispute resolution methods are instruments used in dispute resolution (Hakan Pekcanitez, 'Alternatif Uyuşmazlık Çözümleri', Hukuki Perspektifler Dergisi, (2005) 15; Süha Tanrıver, 'Hukuk Uyuşmazlıkları Bağlamında Alternatif Uyuşmazlık Çözüm Yolları ve Özellikle Arabuluculuk' (2006) 64 Türkiye Barolar Birliği Dergisi (TBBD) 151. For detailed explanations about the emergence and change of alternative dispute resolution methods (ADR) over time, see: Jordi Nieva-Fenoll, 'Mediation and Arbitration: A Disappointing Hope' (2016) 6 International Journal of Procedural Law (IJPL) 351-355). For alternative dispute resolution options in the US, see, Elena Nosyreva, 'Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation' (2001) 7 (1)(3) Annual Survey of International & Comparative Law 8 et seq.
- 8 Işık, 'Mediation' (n 3) 58.
- 9 Symeon C. Symeonides, 'The Swiss Conflicts Codification: An Introduction' (1989) 37 American Journal of Comparative Law (Am J Com L) 187 et seq.
- 10 Schwenkel (n 7) 37; Serpil Işık, 'İsviçre'de Hukuk Uyuşmazlıklarının Alternatif Yollarla Çözümlemesi Kapsamında Tahkim ve Arabuluculuk ile İsviçre Odaları Tahkim Kurumunun Önerdiği İsviçre Ticari Arabuluculuk Kurallarına Genel Bir Bakış' (2019) 10 (2) İnönü Üniversitesi Hukuk Fakültesi Dergisi (İNÜHF) 456; Meier (10) 15; Domitille Baizeau and Catherine A. Kunz 'Switzerland' in Renate Dendorfer-Ditges (eds) *Mediation in 16 Jurisdictions Worldwide* (Getting the Deal Through) 93; Çiğdem Yazıcı Tıktık, *Arabuluculukta Gizliliğin Korunması* (1th edn, On İki Levha 2013) 23. Thus, in Swiss Law, the lawmakes made arrangements in the Swiss Federal Civil Procedure Law, which entered into force on 1 January 2011, by introducing mediation for the first time at federal level and harmonizing its regulations with the United States, Canada and the European Union (Işık, 'İsviçre' (n 10) 456; Meier (10) 15; Baizeau and Kunz (n 10) 93). For a Turkish translation of the Swiss Federal Civil Procedure Code, see: Murat Atalı, 'İsviçre Federal Hukuk Muhakemeleri Kanunu Ön Tasarısı Hakkında Değerlendirmeler' (2006) 3 Legal Medeni Usul ve İcra İflas Hukuku Dergisi (MİHDER) 607-631; Yavuz Alangoya, 'İsviçre'de Yeni Federal Medeni Usul Kanununa Doğru' (2006) (Prof. Dr. Özer Seliçi'ye Armağan) 83; Murat Atalı, 'İsviçre Federal Hukuk Muhakemeleri Kanunu Taslağı' (Çev. Murat Atalı), (2005) 1 Legal Medeni Usul ve İcra İflas Hukuku Dergisi (MİHDER) 162-166. Also, mediation in Swiss Law is voluntary (Paolo Michele Patocechi, 'National Report for Switzerland (2017)', in Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration*, (Kluwer Law International; Kluwer Law International 1984, Supplement No. 95, July 2017) 94; Baizeau and Kunz (n 10) 93; Işık, 'İsviçre' (n 10) 457).

Civil Procedure Code (SchwZPO) with regards to Swiss law<sup>11</sup>. Amendments made in the Swiss law system in relation to mediation and the provision of corporate legal regulations have increased the interest of parties with disputes among themselves to apply for mediation.

While developments were experienced in relation to *ad hoc mediation* in Swiss law, at the same time, institutional mediation rules were foreseen in various arbitration centers<sup>12</sup>. Accordingly, with the aim of providing advanced dispute resolution services, in addition to the arbitration rules that were accepted in 2012 within the body of the Swiss Chambers' Arbitration Institution (SCAI), which was established by the six leading commercial and industrial chambers of Switzerland (Basel, Bern, Geneva, Ticino, Vaud, and Zurich: "Chambers") in 2004, in the year 2007 mediation rules [*Swiss Rules of Commercial Mediation* (SRCM)] were also introduced<sup>13</sup>.

The Swiss Chambers' Arbitration Institution, which has published corporate arbitration and mediation rules with the aim of resolving private civil disputes in alternative ways in Switzerland, revised the Swiss Rules of Commercial Mediation of 2007 on 1 July 2019<sup>14</sup>. Accordingly, starting from 1 July 2019, the *Swiss Rules of Mediation* (SRM) replaced the Swiss Rules of Commercial Mediation of 2007<sup>15</sup>. In this famous example of corporate mediation in Switzerland, the new Swiss mediation rules accepted by the Swiss Chambers' Arbitration Institution bear various changes to their structure<sup>16</sup>. Hence, the fundamental changes made with the 2019 revision to

11 Baizeau and Kunz (n 10) 93; Philipp S Gelzer and Peter Ruggle, *Basler Kommentar; Schweizerische Zivilprozessordnung* in Karl Spühler, Luca Tenchio, Dominik Infanger (Herausgeber) (3. Auflage, Helbing Lichtenhahn 2017) 1151 et seq.; Schwenkel (n 7) 38; Melis Taşpolat Tuğsavul, *Türk Hukukunda Arabuluculuk (6325 sayılı Hukuk Uyuşmazlıklarında Arabuluculuk Kanunu Çerçevesinde)* (1th edn, Yetkin 2012) 63; Işık, 'İsviçre' (n 10) 457; Yazıcı Tıktık (n 10) 23; Ferhat Yıldırım, *Arabuluculuk ve Ombudsmanlık* (1th edn, Seçkin 2019) 34, fn. 36. Indeed, according to Article 213 of the Swiss Federal Civil Procedure Law, which regulates mediation, the court may encourage the parties to mediate at every stage of the case, and the parties may also request to apply to mediation at every stage of the proceedings (Art. 213 (1) (2) SchwZPO). As a matter of fact, in the German original text of article 213 of the Swiss Federal Civil Procedure Code, there is a statement like this: Art. 213 "*Mediation statt Schlichtungsverfahren*"

"Auf Antrag sämtlicher Parteien tritt eine Mediation an die Stelle des Schlichtungsverfahrens.

<sup>2</sup>Der Antrag ist im Schlichtungsgesuch oder an der Schlichtungsverhandlung zu stellen.

<sup>3</sup>Teilt eine Partei der Schlichtungsbehörde das Scheitern der Mediation mit, so wird die Klagebewilligung ausgestellt".

For article 213 of the Swiss Federal Civil Procedure Code, see Philipp S Gelzer and Peter Ruggle, *Basler Kommentar; Schweizerische Zivilprozessordnung* in Karl Spühler, Luca Tenchio, Dominik Infanger (Herausgeber) (3. Auflage, Helbing Lichtenhahn 2017) Art. 213 (n 11) 1152 et seq.

12 Meier (n 10) 11; Baizeau and Kunz (n 10) 95. Accordingly, the Swiss Chambers' Arbitration Institution ("SCAI") in Switzerland; Mediation Centers of WIPO and CAS, Federation of the Swiss Mediation Association "FSM"; There are prominent Institutions that offer mediation services such as the Swiss Lawyers Association (SLA)... (Patocchi (n 10) 95; Baizeau and Kunz (n 10) 95; Meier (n 10) 11; Işık, 'İsviçre' (n 10) 457; Jeremy Lack, 'Civil & Commercial Mediation in Switzerland' 1-10 <<https://www.swissarbitration.org/files/489/1%20%20Lack%20-%20Civil%20and%20Commercial%20Mediation%20in%20Switzerland.pdf>> (Last Online Access 30 December 2019) 2.

13 Baizeau and Kunz (n 10) 95; Işık, 'İsviçre' (n 10) 458; Patocchi (n 10) 8; Naón/Mason, Horacio A. Grigera Naón and Paul E Mason, 'International Commercial Arbitration Practice: 21<sup>st</sup> Century Perspectives' (2010) LexisNexis Matthew Bender § 50.07[1].

14 Florian Mohs, Lukas Rusch and Luca Bossard, 'Revised Swiss Rules of Mediation entered into force on 1 July 2019' 1-5 (Pestalozzi Attorneys at Law) <<https://pestalozzilaw.com/en/news/legal-insights/revised-swiss-rules-mediation-entered-force-1-july-2019/>> (Last Accessed: 23 March 2020) 1.

15 Işık, 'İsviçre' (n 10) 457.

16 See Section V and VI below.

the Swiss Rules of Mediation attract attention. With the said changes, the language of the mediation rules of the Swiss Chambers' Arbitration Institution has become plain and new mediation rules have been shortened<sup>17</sup>. Following the 2019 revision, compared to the 31 original articles, the Swiss Rules of Mediation now constitute only 26 articles<sup>18</sup>. Among the differences from the Swiss Rules of Commercial Mediation of 2007, mediation is not only limited to "commercial topics"; it is related to all private civil disputes<sup>19</sup>. For the selection and assignment of mediators, a simplified designation procedure was introduced<sup>20</sup>. In order to eliminate any doubts related to the role of the mediator during mediation activities, an open arrangement has been made in the provision of the 10th article<sup>21</sup>. As per the Swiss Rules of Mediation of 2019 accepted by the Swiss Chambers' Arbitration Institution, detailed arrangements have been made about dispute resolution processes including *mediation* and *arbitration* together<sup>22</sup> (*Mediation-Arbitration* - "Med-Arb"; *Arbitration-Mediation* - "Arb-Med"). Hence, the Swiss Rules of Mediation of 2019 stipulate arrangements that support the relationship between mediation and arbitration<sup>23</sup>. Again, if there are any disputes related to mediation costs, as a new tool for the resolution of that issue, the *Advisory Council for Mediation* has been established within the body of the Swiss Chambers' Arbitration Institution<sup>24</sup>.

- 17 Because the 2007 Swiss Rules of Commercial Mediation consisted of 8 chapters and 31 articles in total (Işık, 'İsviçre' (n 10) 458). For the 3 -item rules foreseen in the 2007 Swiss Rules of Commercial Mediation, which have come into force, see [https://www.swissarbitration.org/files/50/Swiss%20Rules%202019/2007%20Swiss%20Rules%20of%20Commercial%20Mediation%20\(English\).pdf](https://www.swissarbitration.org/files/50/Swiss%20Rules%202019/2007%20Swiss%20Rules%20of%20Commercial%20Mediation%20(English).pdf) (Last Online Access: 27 February 2020).
- 18 For the 26 articles brought by the new Swiss Rules of Mediation after the 2019 revision, See: [http://www.swissarbitration.org/files/838/Swiss%20Rules%202019/Web%20versions%202019/Mediation%20Web%202019/mediation\\_2019\\_webversion\\_english.pdf](http://www.swissarbitration.org/files/838/Swiss%20Rules%202019/Web%20versions%202019/Mediation%20Web%202019/mediation_2019_webversion_english.pdf) (Last Online Access 27 February 2020).
- 19 Naón and Mason (n 13) § 50.07[1] p 50-07; Mohs, Rusch and Bossard (n 14) 1. In the revised Swiss Mediation Rules proposed by the Swiss Chambers' Arbitration Institution after the 2019 revision, the deletion of the word "*Commercial*", which is in the Swiss Rules of Commercial Mediation, is to be used for both *commercial* and *non-commercial* disputes. For more information about See Section V, A below.
- 20 See "*Simplified designation procedure*" Art. 5 SRM.
- 21 Mohs, Rusch and Bossard (n 14) 2. The role of mediator Art. 10 It was clarified in SRM and in the explanation in the introduction. As a matter of fact, in terms of the role of the mediator, an expression like the following is included in the introduction part: "*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 specifically requested by the parties, the mediator does not give his or her own views (as would an expert), and abstains from making proposals (as would a conciliator)*" See "*Introduction*" Swiss Rules of Mediation, p. 3. See also Section V, B below.
- 22 Mohs, Rusch and Bossard (n 14) 2. Mediation-Arbitration ("*Med-Arb*") in the Swiss Rules of Mediation revised after the 2019 revision is regulated in article 18. *Arbitration-Mediation* ("*Arb-Med*"), will be carried out in accordance with the principles in article 19. See: Articles 18-19. See also Section V, E, 2 and 3 below.
- 23 Regulations regarding dispute resolution methods involving mediation and arbitration together in the Swiss Rules of Commercial Mediation of 2007 SRCM, it was implemented within the framework of the principles envisaged in Art. 23-24. Just as the 2007 Swiss Rules of Commercial Mediation, parties wishing to apply to the arbitration path during mediation or mediation during the arbitration action, the new Swiss Rules of Mediation (SRM) of Art. 18-19, they have the opportunity to resolve the disputes between them by means of arbitration/mediation by following the procedure stipulated in the 18-19 regulations (See also Section V, E, 2 below). Swiss Chambers' Arbitration Institutions has introduced regulations emphasizing the relationship between mediation and arbitration see Naón and Mason (n 13) § 50.07[4] p 50-17; Baizeau and Kunz (n 10) 94; Işık, 'İsviçre' (n 10) 463-46; Jeremy Lack, 'The New Swiss Rules of Commercial Mediation of the Swiss Chambers of Commerce and Industry': Possible Links to Arbitration', 105-124 <[https://www.swissarbitration.org/files/489/jl\\_2008\\_Swiss\\_Rules\\_Commercial\\_Mediation.pdf](https://www.swissarbitration.org/files/489/jl_2008_Swiss_Rules_Commercial_Mediation.pdf)> (Last Online Access 28 February 2019) 121.
- 24 Mohs, Rusch and Bossard (n 14) 4. The revised 2019 Swiss Rules of Mediation provides as SCAI Advisory Council for Mediation. Accordingly, in accordance with Article 24(4) of the Swiss Rules of Mediation, disputes related to mediation costs will be submitted to the SCAI Mediation Advisory Council and a solution will be achieved. See, Art. 24(4). See also Section V, D below.

Apart from these changes, in the revision of the mediation rules of the Swiss Chambers' Arbitration Institution, developments related to the United Nations Convention on International Settlement Agreements Resulting from Mediation (UNCITRAL, New York, 2018; also known as the "Singapore Convention on Mediation") became effective, having been approved on 25 June 2018<sup>25</sup>. After approval of the final drafts on 25 June 2018, the Singapore Convention on Mediation was unanimously accepted by the General Assembly of the United Nations<sup>26</sup>. Hence, being open for signatures on 7 August 2019, the Singapore Convention on Mediation was signed by 46 countries in the first stage<sup>27</sup>. With the Singapore Convention on Mediation, it has become possible to execute agreements of reconciliation attained as a result of the agreement of parties by mediation in other countries<sup>28</sup>. Developments seen in relation to the Singapore Convention on Mediation, which was planned to facilitate the execution of international agreement documents, resulted in the revision of the Swiss Rules of Commercial Mediation of 2007 as foreseen within the Swiss Chambers' Arbitration Institution<sup>29</sup>. Hence, by being revised on 1 July 2019, the Swiss Rules of Mediation became one of the first corporate mediation arrangements meeting the requirements of the Singapore Agreement<sup>30</sup>. Accordingly, in order to have conformity with the Singapore Convention on Mediation, in the regulations of Art. 17(2)(3) of the Swiss Rules of Mediation of 2019, a provision was introduced enabling approved copies to be given in such a way as to facilitate execution of reconciliation agreements<sup>31</sup>. As the Swiss Chambers' Arbitration Institution has introduced regulations related to the usage of mediation outside the national borders for parties wishing to resolve their disputes

25 For the English text of the UNCITRAL, *United Nations Convention on International Settlement Agreements Resulting from Mediation*, see, [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation\\_convention\\_v1900316\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf) (Last Online Access 20 February 2020). For the Turkish translation of the Singapore Convention, see Ergun Özsunay, "Arabuluculuk Sonucunda Yapılan Uluslararası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi": Singapur Arabuluculuk Sözleşmesi Türk Hukukuyla Uyumlu Bakımından Bir Değerlendirme" (2019) 93 İstanbul Barosu Dergisi 31-49. For more information about Singapore Convention, see Eunice Chua, "The Singapore convention on mediation – A brighter for Asian dispute Resolution" (2019) Asian Journal of International Law Research Collection Scholl Of Law 1 et seq.; Bruno Zeller/Leon Trakman: "Mediation and Arbitration: the process of enforcement", *Uniform Law Review* (Unif. L. Rev.), Vol. 24, Issue 2, June 2019, (pp. 449-466), s. 449 et seq.; Özsunay, 'Singapur Sözleşmesi' (n 25) 35 et seq.

26 Zeller and Trakman (n 25) 453 et seq.; Sibel Özel, 'Arabuluculuk Sonucunda Yapılan Milletlerarası Sulh Anlaşmaları Hakkında Birleşmiş Milletler Sözleşmesi: Singapur Konvansiyonu' (2019) 25 2 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Baykal Armağanı) 1194; Güven Yerar, *Milletlerarası Özel Hukukta Arabuluculuk* (1th edn, On İki Levha 2019) 153; Özsunay, 'Singapur Sözleşmesi' (n 25) 31; Talat Kaya, 'Singapur Sözleşmesi ve Uluslararası Ticari Arabuluculuk Sonucunda Ortaya Çıkan Sulh Anlaşmalarının Tanınması ve İcrası Meselesi' (2019) 25 2 Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi (Prof. Dr. Ferit Baykal Armağanı) 981-982; Ersin Erdoğan, 'Milletlerarası Arabuluculuk Anlaşma Belgelerinin İcrasına İlişkin BM Sözleşmesinin (Singapur Sözleşmesi) Değerlendirilmesi' in Ersin Erdoğan (ed.) *Arabuluculuğun Geliştirilmesi Uluslararası Sempozyumu* (6-7 Aralık 2018) 189; Faruk Kerem Giray, 'Tenfize İlişkin Üç Soru: Tenfize Konu Yabancı İllâmın Hukuk Devletinden Sadır Olması Gerekir Mi? Arabuluculuk Neticesinde Yapılan Sulh Anlaşması Tenfiz Edilebilir Mi? Yabancı Mahkemenin Sadır Ödeme Emri Kararı Tenfiz Edilebilir Mi?' (2019) 39(2) Public and Private International Law Bulletin 533; Dhawan (n 3) 40.

27 Özsunay, 'Singapur Sözleşmesi' (n 25) 31; Özel (n 26) 1195; Yerar (n 26) 153; Kaya (n 26) 982; Mustafa Erkan, *Arabuluculuk ve Singapur Sözleşmesi* (1th edn, On İki Levha 2020) 83.

28 Zeller and Trakman (n 25) 449; Özel (n 26) 1195.

29 Peter F Phillips, 'New Swiss Rules of Mediation' <<http://www.businessconflictmanagement.com/blog/2019/08/new-swiss-rules-of-mediation/>> (Last Online Access 16 March 2020).

30 See Section VI, C below.

31 Art. 17(2)(3) SRM.

by means of the Swiss Rules of Mediation of 2019, this has doubtlessly contributed to the increasing popularity of mediation in Switzerland.

For this reason, in our study, by evaluating the Swiss Rules of Mediation that have been in application since 1 July 2019, an evaluation of the fundamental changes introduced with these regulations will be conducted with examples with respect to corporate mediation. In this context, first the history of the Swiss Chambers' Arbitration Institution will be described, and general explanations of this famous Swiss corporate arbitration center will be made. Afterwards, in accordance with the Swiss Rules of Mediation that were amended with the 2019 revision, the mediation procedure will be described. Finally, the fundamental changes introduced with the new revised Swiss Rules of Mediation of 2019 will be outlined.

## II. General Explanations About the Establishment, History, and Purpose of the Swiss Chambers' Arbitration Institution

In the Swiss legal system, options for alternative dispute resolution play an important role<sup>32</sup>. The Swiss Chamber of Commerce has been carrying out international arbitration judgments since 1911<sup>33</sup>. With the aim of providing advanced dispute resolution services, six commercial and industrial chambers (*Basel, Bern, Geneva, Ticino, Vaud, and Zurich: "Chambers"*) harmonized their arbitration rules in 2004 and established

32 Schwenkel (n 7) 49. Historically, Geneva and Zurich hosted *institutional* and *Ad Hoc* arbitral proceedings. Likewise, Lusanne is another Swiss canton that stands out in terms of international arbitration proceedings with the Sports Arbitration Court (CAS/TAS) which deals with most of the sport-related disputes internationally (Naón and Mason (n 13) p 50-2). See also <https://www.tas-cas.org/en/index.html> (Last Online Access 25 November 2019). Indeed, Switzerland and international arbitration are considered interconnected and intertwined for many people in conflict (Stephen R Bond, 'The New Swiss Law on International Arbitration and the Arbitral Institutions' (1989) 1989 International Business Law Journal (Int'l Bus L.J) 786). Switzerland has been a preferred country for years to host both institutional and *Ad Hoc* arbitration proceedings (Martin Wiebecke, 'Switzerland' in: Carter, James H. (eds), *The International Arbitration Review*, (7th Edition, United Kingdom, Law Business Research 2016) 509; Simone Hofbauer, 'Chapter 1, Part I: History of Arbitration', in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2013) 3). Concordat (The Concordat-the Swiss Intercantonal Arbitration Convention) was valid for international arbitration and internal arbitration in Switzerland (Marc Blessing, 'The New International Arbitration Law in Switzerland: A Significant Step Towards Liberalism', in *Journal of International Arbitration*, (Kluwer Law International 1988, Volume 5 Issue2) 12; Robert Briner, 'National Report – Switzerland', in Albert Jan van den Berg (eds), *Yearbook Commercial Arbitration* 1989 (14), (Kluwer Law International 1989) 1; Briner Robert, 'National Report for Switzerland (1978- 1982-1984) [ARCHIVED]', in Pieter Sanders (ed), *Yearbook Commercial Arbitration 1978(3)* (Kluwer Law International 1978) 181; Patocchi (n 10) 3; Walter J Habscheid, 'Das neue schweizerische Recht der internationalen Schiedsgerichtsbarkeit nach dem Bundesgesetz über das Internationale Privatrecht' (34 Jahrgang 1988) 10 *Recht der Internationalen Wirtschaft (RIW)* 766; Thomas Rüede and Reimer Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht: nach Konkordat und IPRG* (2. Auflage, Schulthess 1993) 6; Daniel Hochstrasser and Simone Fuchs, *Basler Kommentar* in: Honsell, Heinrich; Vogt, Nedim Peter (Hrsg.), Schnyder, Anton K.; Bertl, Stephan V. (Internationales Privatrecht, 3. Auflage, Basel, Helbing Lichtenhahn 2013) 1664; Stefanie Pfisterer-Berner Kommentar, Stacher, Marco (Hrsg.): *Kommentar zum schweizerischen Privatrecht, Schweizerische Zivilprozessordnung, Band III Art. 353-399 ZPO, Art. 407 ZPO* (Stämpfli 2014) Art. 353, 1; Cesare Jermini and Nicola Bernardoni, 'Chapter 1, Part II: Domestic Arbitration under the New Swiss Code of Civil Procedure', in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International 2013) 17). Today, international arbitration in Swiss Law, the provisions of the Swiss International Private Law Act (*Bundesgesetz über das Internationale Privatrecht- SchwIPRG*) (Art. 176-194) will apply (Briner, 'Switzerland' (n 32) 2; Wiebecke (n 32) 500; Habscheid (n 32) 766; Rüede and Hadenfeldt (n 32) 10 et seq.; Hochstrasser and Fuchs, BSK IPRG (n 32) 1665; Jermini and Bernardoni (n 32) 17; Nevhis Deren-Yıldırım, *Uncitral Model Kanunu ve Milletlerarası Tahkim Kanunu Çerçevesinde Milletlerarası Tahkimin Esaslı Sorunları* (1th edn, Alkım, 2004) 14). In terms of national arbitration in Switzerland, the provisions of the Swiss Federal Civil Procedure Code (SchwZPO Art. 353-399), which entered into force on 1 January 2011, will apply (Hofbauer (n 32) 5-6; Wiebecke (n 32) 500; Jermini and Bernardoni (n 32) 17; Hochstrasser and Fuchs, BSK IPRG (n 32) 1665).

33 Naón and Mason (n 13) p 50-2.



the Swiss Chambers' Arbitration Institution (SCAI)<sup>34</sup>. Afterwards, Neuchatel was also included in the Swiss Commercial and Industrial Chambers<sup>35</sup>.

The Swiss Chambers' Arbitration Institution is an unbiased and independent private institution in Switzerland<sup>36</sup>. When the structure of the Swiss Chambers' Arbitration Institution is examined, it is seen that it shows similarities to other corporate arbitration centers<sup>37</sup>. Accordingly, this famous center providing corporate arbitration services in Switzerland realizes its activities through an Arbitration Court (*Schiedsgerichtshof*) and a Secretary (*Sekretariat*) constituting its structure<sup>38</sup>. The Arbitration Court (*Schiedsgerichtshof*)<sup>39</sup> as a part of the structure of the Swiss Chambers' Arbitration Institution is composed of implementers experienced in international arbitration issues<sup>40</sup>. The Arbitration Court is responsible for the execution of arbitration judgments as per Swiss rules<sup>41</sup>. The position of Secretary within the body of the Swiss Chambers' Arbitration Institution was established to assist the Arbitration Court with its works<sup>42</sup>. The Secretary realizes tasks by directly getting into contact with arbitration parties and committees of referees<sup>43</sup>. The Secretary of the Swiss Chambers' Arbitration Institution works with offices in Geneva, Lugano, and Zurich opening cases in English, German, French, and Italian<sup>44</sup>. With the publication of the 2007 mediation rules, the Swiss Chambers' Arbitration Institution established an Advisory Council for Mediation (*Advisory Council*) comprising experienced mediators with the aim of providing guidance and assistance regarding mediation activities<sup>45</sup>.

34 Patocchi (n 10) 8; Isik, 'İsviçre' (n 10) 458; Bernhard F Meyer and Dominik Vock, *Handbuch Schiedsgerichtsbarkeit in Torggler, Helwig; Mohs, Florian; Schäfer, Friederike; Wong, Ventis Valentina* (Hrsg.) (2. Aufl., Nomos Österreich Schulthess 2017) N 438 p 136; Naón and Mason (n 13) § 50.01 p 50-2.

35 Naón and Mason (n 13) § 50.01 p 50-2 fn 1.

36 Xavier Favre-Bulle, 'The Swiss Rules of International Arbitration ("Swiss Rules"): From 2004 to the (Light) 2012 Revision (Le Reglement Suisse D'Arbitrage International ("Swiss Rules"): de 2004 A la Revision (Legere) de 2012)' (2013) 2013 (1) International Business Law Journal 24. See, <https://www.swissarbitration.org/>. (Last Online Access: 26 November 2019). See, English version of the Swiss Rules of Mediation, p. 3.

37 Favre-Bulle (n 36) 23. As a result of the changes in the Swiss Rules in the structure of the Arbitral Institution of the Swiss Chambers' the effectiveness of the management of the services provided regarding the dispute resolution methods has been increased and the institutional structure has been facilitated (Favre-Bulle (n 36) 23).

38 Offering institutional arbitration and mediation services in Switzerland, this renowned center performs its activities through the "three institutions" that make up its structure (Favre-Bulle (n 36) 24). Accordingly, the Swiss Chambers' Arbitration Institution, which is an "institution" independent of the seven Swiss Chambers of Commerce and Industry, itself (SCAI); is an "arbitral tribunal" (*Schiedsgerichtshof*) responsible for overseeing each arbitration process and a "Secretariat" (*Secretariat*) created to assist the court (Meyer and Vock (n 34) N 440-442 p 136; Favre-Bulle (n 36) 23-24).

39 See Favre-Bulle (n 36) 24.

40 Meyer and Vock (n 34) N 441 p 136.

41 Meyer and Vock (n 34) N 441 p 136. At the same time, Meyer/Vock states that although the court was established, arbitration control was left to the arbitral tribunals. See, Meyer and Vock (n 34) N 441 p 136. However, Favre-Bulle states that the arbitral tribunal is responsible for overseeing the arbitration process (Favre-Bulle (n 36) 24).

42 Favre-Bulle (n 36) 24; Meyer and Vock (n 34) N 441 p 136.

43 In other words, the Secretariat, located in the structure of the Swiss Chambers' Arbitration Institution, is supporting the court and the parties in resolving the dispute (Meyer and Vock (n 34) N 442 p 137).

44 For the SCAI Secretariat addresses, see Swiss Rules of Mediation, Annex A, p. 10. Also, for updated information on SCAI Secretariat addresses, see SCAI's website see: <https://www.swissarbitration.org/Mediation/Initiating-mediation>) (Last Online Access: 3 December 2019).

45 See Art. 24(4) SRM.

### III. Alternative Dispute Resolution Methods Within The Body Of The Swiss Chambers' Arbitration Institution

#### A. Rules Related to Arbitration (International Swiss Arbitration Rules)

At the beginning, the Swiss Commercial and Industrial Chambers (Basel, Bern, Geneva, Vaud, and Zurich) (*Swiss Chambers*) had their own arbitration rules regarding international commercial disputes<sup>46</sup>. By harmonizing their rules related to arbitration, the Swiss Commercial and Industrial Chambers accepted the *Swiss Rules of International Arbitration*<sup>47</sup> (*Swiss Rules*) in the first uniform version becoming effective on 1 January 2004<sup>48</sup>. The Swiss Rules were based on the 1976 version of the UNCITRAL<sup>49</sup> arbitration rules of the United Nations<sup>50</sup>.

In their first version, the Swiss Rules were accepted as being the most modern and cheapest arbitration rules in the world and, in fact, the need for revision was low<sup>51</sup>. However, in order to harmonize with the latest developments in international arbitration, the Swiss Chambers decided to revise the Swiss Rules in 2010<sup>52</sup>. Regarding arbitration, rules of the Swiss Chambers' Arbitration Institution (SCAI) were revised and the Swiss Rules of International Arbitration ("Swiss Rules 2012") were accepted, becoming effective on 1 June 2012<sup>53</sup>. The purpose of revising the Swiss Rules on 1 June 2012 was to make the processes related to arbitration judgments more efficient and less costly, to rearrange the arbitration court, to enable more flexibility for arbitration procedures with many parties, and to improve cost control<sup>54</sup>.

#### B. Mediation Rules Stipulated by the Swiss Chambers' Arbitration Institution

##### 1. In General

A situation where parties having disputes among themselves apply for mediation by means of corporate centers allows disputes to be effectively resolved by the mediation method<sup>55</sup>. In accordance, with the aim of resolving disputes among parties by the

46 Meyer and Vock (n 34) N 438 p 136.

47 "The Swiss Rules of International Arbitration" (SRIA) ("Swiss Rules").

48 Patocchi (n 10) 9; Meyer and Vock (n 34) N 438 p 136; Işık, 'İsviçre' (n 10) 458; Favre-Bulle (n 36) 21.

49 UNCITRAL- "United Nations Commission on International Trade Law".

50 Favre-Bulle (n 36) 21; Naón and Mason (n 13) § 50.02 p 50-2; Patocchi (n 10) 9.

51 Meyer and Vock (n 34) N 439 p 137.

52 Meyer and Vock (n 34) N 439 pp 136-137.

53 Patocchi (n 10) 9; Favre-Bulle (n 36) 21; Işık, 'İsviçre' (n 10) 458; Domitille Baizeau and Sam Moss 'İnşaat Uyuşmazlıklarının İsviçre Milletlerarası Tahkim Kuralları Çerçevesinde Etkim Çözümü İsviçre Odaları Tahkim Kurumunun İşlevi', (Çev. Gözde Kasap) in Yeşim Atamer Ece Baş Süzöl and Elliot Geisinger (eds) *Uluslararası İnşaat Sözleşmeleri ve Uyuşmazlık Çözüm Yolları Uluslararası İnşaat Hukuku Konferansları-I* (On İki Levha 2018) 207; Meyer and Vock (n 34) N 439 p 137. The Swiss Rules, the original version of which consists of 44 items, consists of 45 items as a result of the revision (Meyer and Vock (n 34) N 439 p 137).

54 Meyer and Vock (n 34) N 439 p 137; Baizeau and Moss (n 53) 210-211; Patocchi (n 10) 9.

55 Alysoun Boyle, 'Effectiveness in Mediation: a New Approach' (2017) 12 Newcastle Law Review 153.

mediation method in an effective way, mediation rules have also been introduced by the Swiss Chambers' Arbitration Institution, apart from arbitration rules<sup>56</sup>.

## 2. Swiss Rules on Commercial Mediation (2007)

The Swiss Commercial and Industrial Chambers accepted the Swiss Rules of Commercial Mediation (SRCM) in 2007<sup>57</sup>. With the acceptance of mediation rules by the Swiss Chambers' Arbitration Institution in 2007, it was possible for a connection to be established between *mediation* and *arbitration*<sup>58</sup>. For an application period of twelve years, starting from 2007, when the Swiss Rules of Commercial Mediation became effective, until 1 July 2019, when they were revised and the old version became ineffective, the Swiss Rules of Commercial Mediation of 2007 helped parties resolve commercial and industrial disputes among themselves<sup>59</sup>. In this context, according to the Swiss Rules of Commercial Mediation, 64% of cases using mediation were resolved amicably<sup>60</sup>. With the aim of harmonizing the mediation rules, the Swiss Chambers' Arbitration Institution replaced the prior rules of 2007 with the Swiss Rules of Mediation (SRM)<sup>61</sup>.

## 3. New Swiss Mediation Rules (2019)

The Swiss Rules of Mediation became effective on 1 July 2019<sup>62</sup>. Starting from 1 July 2019 the Swiss Rules of Mediation (SRM) replaced the Swiss Rules of Commercial Mediation (SRCM) (2007) within the body of the Swiss Chambers' Arbitration Institution<sup>63</sup>.

When the new Swiss Rules of Mediation are structurally evaluated, it is seen that they comprise 8 sections<sup>64</sup>. As part of the Swiss Rules of Mediation being implemented on 1 July 2019, principles were regulated in relation to “Introductory Rules” (Arts. 1-2 SRM), “Selection of Mediator(s)” (Arts. 3-8 SRM), “The Mediator” (Arts. 9-10 SRM), “Procedural Rules” (Arts. 11-15 SRM), “End of the Mediation and Certification

56 Işık, ‘İsviçre’ (n 10) 458.

57 Naón and Mason (n 13) § 50.07[1] p 50-13; Işık, ‘İsviçre’ (n 10) 458; Baizeau and Kunz (n 10) 95; Mohs, Rusch and Bossard (n 14) 1.

58 Lack ‘Mediation in Switzerland’ (n 12) 1.

59 Işık, ‘İsviçre’ (n 10) 466.

60 As can be seen, according to the Swiss Rules of Commercial Mediation (2007) the success rate of the parties who want to resolve their mismatch according to the mediation rules envisaged by SCAI from 2007 to 2008 is quite high. [https://pestalozzilaw.com/media/publications/documents/2019\\_Streamlining\\_the\\_Swiss\\_Rules\\_of\\_Mediation.pdf](https://pestalozzilaw.com/media/publications/documents/2019_Streamlining_the_Swiss_Rules_of_Mediation.pdf) (Last Online Access: 23 November 2019).

61 <https://www.swissarbitration.org/Mediation/Mediation-rules> (Last Online Access: 23 November 2019).

62 Mohs, Rusch and Bossard (n 14) 1.

63 Işık, ‘İsviçre’ (n 10) 457; Mohs, Rusch and Bossard (n 14) 1; Phillips, F. Peter, “New Swiss Rules of Mediation” See: <http://www.businessconflictmanagement.com/blog/2019/08/new-swiss-rules-of-mediation/> (Last Online Access: 23 November 2019).

64 Mohs, Rusch and Bossard (n 14) 1.

thereof” (Arts. 16-17 SRM), “Mediation and Arbitration” (Arts. 18-19 SRM), “Exclusion of Liability” (Art. 20 SRM), and “Costs” (Arts. 21-26 SRM) within the scope of 8 sections, respectively<sup>65</sup>. As can be seen, the Swiss Rules of Mediation are stipulated in the form of 26 articles<sup>66</sup>.

By adopting an extensive and serious user consultancy procedure, with regards to the reviewed mediation rules, it was aimed to clarify the language of the mediation rules being presented to the implementer, to simplify the language, and to facilitate usage of the rules with respect to various types of disputes<sup>67</sup>.

#### **IV. Explanation and Evaluation of New Swiss Rules Of Mediation (2019) Being Stipulated within the Body of the Swiss Chambers’ Arbitration Institution**

##### **A. Area of Application of Swiss Rules of Mediation (2019)**

It is seen today that parties apply for mediation in order to resolve various disputes among themselves<sup>68</sup>. Accordingly, mediation is an alternative method of dispute resolution being frequently applied when there are disputes related to family law, commercial law, business law, and others<sup>69</sup>. The Swiss Rules of Mediation (2019) will be applied for all mediation procedures being explicitly accepted by parties having disputes among themselves to apply mediation as per the specified rules<sup>70</sup>. Unless it is decided otherwise among the parties, the Swiss Rules of Mediation (2019) will be applied for all mediations transmitted to the Secretary with regards to mediation requests starting from 1 July 2019<sup>71</sup> (Art. 1(2) SRM).

65 In the arrangements envisaged within the scope of 26 articles in 8 sections envisaged within the scope of the Swiss Rules of Mediation presented by the Arbitration Institution of the Swiss Chambers, under section I. titled “*Introductory Rules*”, Scope of Application (Art. 1 SRM), Request for mediation (Art. 2 SRM); Under the section II. titled “*Selection of Mediator(s)*”, Number of Mediators (Art. 3 SRM), Designation of a mediator (Art. 4 SRM), Simplified designation procedure (Art. 5 SRM), Confirmation of a mediator (Art. 6 SRM); Replacement of a mediator (Art. 7 SRM); Transmission of the file to the mediator (Art. 8 SRM); Under the Section III. “*Mediator*”, the Independence, impartiality and availability of the mediator (Art. 9 SRM); Role of the mediator (Art. 10, SRM); Under the Section IV. “*Rules of Procedure*”, Conduct of the Mediation (Art. 11 SRM), Representation (Art. 12 SRM), Confidentiality (Art. 13 SRM), Seat of the mediation (Art. 14 SRM) Applicable law (Art. 15 SRM); In Section V. “*End of the Mediation and Certification thereof*”, End of the Mediation and Certification thereof (Art. 16); Settlement agreement and Certification thereof (Art. 17 SRM), In the Section VI. titled “*Mediation and Arbitration*”, Recourse to arbitration (Art. 18 SRM), Mediation during the course of arbitral proceedings (Art. 19 SRM), Under the Section VII. titled “*Exclusion of Liability*”, Exclusion of liability (Art. 20 SRM); Under the Section VIII. titled “*Costs*”, Mediation Costs (Art. 21 SRM), Appointment of the Mediation Costs (Art. 22 SRM), SCAI Fees, Costs and Expenses (Art. 23 SRM), The mediator’s fees and expenses (Art. 24 SRM), Deposits for fees and Costs (Art. 25 SRM) Statement of costs (Art. 26 SRM) are foreseen. See, [http://www.swissarbitration.org/files/838/Swiss%20Rules%202019/Web%20versions%202019/Mediation%20Web%202019/mediation\\_2019\\_webversion\\_english.pdf](http://www.swissarbitration.org/files/838/Swiss%20Rules%202019/Web%20versions%202019/Mediation%20Web%202019/mediation_2019_webversion_english.pdf) (Last Online Access: 30 November 2019).

66 Mohs, Rusch and Bossard (n 14) 1.

67 See, Section V, A below.

68 Rachael Field and Neal Wood, ‘Marketing Mediation Ethically: The Case of Confidentiality’ (2005) 5 Queensland University of Technology Law and Justice Journal 143.

69 Jonathan Crowe, ‘Two Models of Mediation Ethics’ (2017) 39 Sydney Law Review 147; Field and Wood (n 68) 143.

70 Art. 1(1) SRM. Mohs, Rusch and Bossard (n 14) 2. As a matter of fact, according to paragraph 1 of the Article 1 of the Swiss Rules of Mediation, the mediation rules of the Swiss Mediation Rules refer to the Mediation Rules of any Swiss Chamber of Commerce and Industry, or the parties of the dispute, in accordance with the Swiss Mediation Rules. Its clearly stated that it will be applied to all mediations that they agree to do (See, Art. 1(1) SRM).

71 Mohs, Rusch and Bossard (n 14) 2.

## B. Applying for Mediation as per the Swiss Rules of Mediation (2019)

Mediation starts when negotiations among parties are not providing any help or when no results can be obtained from those negotiations as per the decision of the parties involved in the dispute<sup>72</sup>. According to the 2nd article of the Swiss Rules of Mediation, one of the involved parties will submit a mediation request by transmitting it to the Swiss Chambers' Arbitration Institution<sup>73</sup>. Within this context, parties wishing to resolve their disputes by means of mediation within the body of the Swiss Chambers' Arbitration Institution will apply to one of the Secretary offices stipulated in Appendix A of the Swiss Rules of Mediation and they will be able to make a request for mediation in English, German, French, or Italian<sup>74</sup>. The request being made by parties will be sent by e-mail to the Secretary within the body of the Swiss Chambers' Arbitration Institution<sup>75</sup>. As per the request of the Secretary, the party or parties making the request will provide printed copies of the request<sup>76</sup>. Parties and the Secretary could accept the presentation of all other documents by *e-mail* or *other electronic forms*<sup>77</sup>. When parties wish to apply for mediation in accordance with the Swiss Rules of Mediation within the body of the Swiss Chambers' Arbitration Institution, if any deficiencies are determined in relation to the request, the Secretary could ask the requesting parties to correct those deficiencies within an appropriate time period<sup>78</sup>.

## C. Assignment of Mediator as per Swiss Rules of Mediation (2019) and Principles Related to Mediators

If the parties applying for mediation as per the Swiss Rules of Mediation as stipulated by the Swiss Chambers' Arbitration Institution submit their mediation request in a valid way, it will be passed on for assigning a mediator as per the regulations stipulated in Arts. 3-10 of the Swiss Rules of Mediation (SRM) with the aim of resolving the dispute<sup>79</sup>.

72 Durand (n 3) 976; Leonard L Riskin, 'The Special Place of Mediation in Alternative Dispute Processing' (1985) 37 University of Florida Law Review 22.

73 Baizeau and Kunz (n 10) 96; Işık, 'İsviçre' (n 10) 459; Mohs, Rusch and Bossard (n 14) 2.

74 Art. 2(1) SRM. Işık, 'İsviçre' (n 10) 459. According to Article 2(2) of the Swiss Rules of Mediation, the mediation request should include: "(a) the names, addresses, telephone numbers, fax numbers (if any), e-mail addresses and other contact details for appropriate electronic communication (if any) of the parties and their counsel (if any), as well as a copy of the counsel's Power-of-Attorney; (b) a copy of the agreement to mediate or relevant mediation clause in an existing agreement (if any); (c) a short description of the dispute, and an estimate of the amount in dispute (if any); (d) a joint designation of the mediator, or a description of any desired qualifications of the mediator; (e) an indication, if the parties so wish, that the Simplified Designation Procedure, pursuant to Article 5, should apply; (f) a proposal as to the language of the mediation if the parties have not previously agreed thereon; (g) a confirmation of the payment of the registration fee, pursuant to Appendix B of the Rules in force at the date on which the Request is submitted to the Secretariat".

75 Art. 2(3) SRM.

76 Işık, 'İsviçre' (n 10) 459.

77 Art. 2(3) SRM.

78 Art. 2(4) SRM. Indeed, in such a case, if the parties wishing to apply for mediation within the Swiss Chambers' Arbitration Institution resolve the deficiencies detected within the time period determined by the Secretariat, it will be considered that the original request for mediation was submitted on the date of receipt by the Secretariat of the Swiss Chambers' Arbitration Institution (Art. 2(4) SRM).

79 See, "II. Selection of mediator(s)" Art. 3-8 SRM and "III. The Mediator" Art. 9-10 SRM. On the appointment of the mediator in accordance with the 2007 Swiss Rules of Commercial Mediation foreseen and revised within the Arbitration Body of the Swiss Chambers, See Naón and Mason (n 13) § 50.07[2] p 50-07; Işık, 'İsviçre' (n 10) 460-461.

## 1. Number, Selection, and Assignment of Mediators

According to the new revised Swiss Rules of Mediation (2019) stipulated by the Swiss Chambers' Arbitration Institution, as per the agreement of both parties regarding the dispute, “*one mediator*” will be selected as a rule<sup>80</sup>. In other words, unless decided otherwise by all parties, according to the Swiss Rules of Mediation stipulated by the Swiss Chambers' Arbitration Institution, mediation will be carried out by one mediator<sup>81</sup>. On the other hand, the Swiss Rules of Mediation specify that it is also possible to assign more than one mediator for the resolution of a dispute by the parties<sup>82</sup>.

Parties could jointly determine the mediator who will assist them in resolving the dispute among themselves<sup>83</sup>. Furthermore, it will also be required that the mediator(s) being jointly determined by the parties be confirmed by the Secretary of the Swiss Chambers' Arbitration Institution<sup>84</sup>. In the event that the mediator(s) being assigned by the parties have not been confirmed by the Secretary, the Secretary will allow a period of fifteen days in order for the parties to assign a new mediator in a joint way<sup>85</sup>.

According to the Swiss Rules of Mediation stipulated by the Swiss Chambers' Arbitration Institution, if it is requested by the parties, the Secretary will assist in determining co-mediators<sup>86</sup>. A new practice accepted as a result of the revision of the Swiss Rules of Mediation with respect to the assignment of mediators is related to the “*simplified designation procedure*” stated in the 5th article of the Swiss Rules of Mediation<sup>87</sup>. Accordingly, as per the regulation of the 5th article of the Swiss Rules of Mediation, the simplified designation procedure will be applied in situations in which parties have reached an agreement or where the amount of dispute is below 50,000 Swiss Francs (CHF) and the parties have not made any objections<sup>88</sup>.

80 Işık, ‘İsviçre’ (n 10) 460. See also Article 3 SRM. Also, for more informations about the mediator’s choice in general, see Nahrstadt (n 3) 68; Hans-Patrick Schroeder, ‘The Advocate’s Role in Mediation Proceedings: A German Perspective on Effective Mediation Advocacy’ (2017) 5 Yearbook on International Arbitration (YB on Int’l Arb) 257; Riskin (n 72) 22.

81 Işık, ‘İsviçre’ (n 10) 460.

82 Art. 3 SRM. Işık, ‘İsviçre’ (n 10) 460.

83 Art. 4(1) SRM.

84 Işık, ‘İsviçre’ (n 10) 460. In this context, the Swiss Rules of Mediation (SRM) envisaged by the Arbitral Agency of the Swiss Chambers will be approved in accordance with the regulations stipulated in Article 6.

85 Art. 4(1) SRM. Within five days from the receipt of the appointment notice in writing, and if this objection is considered valid, the Swiss Chambers' Arbitration Institution Secretariat will appoint another mediator from the list immediately proposed under Article 4(2) of the Swiss Rules of Mediation and will continue the mediation procedure (Art. 4(4) SRM).

86 Art. 4(3) SRM. For more information about co-mediation, see Seda Özmumcu, ‘Hukuk Uyuşmazlıklarının Çözümünde Eş Arbuluculuk (Co-Mediation) Modelinin Değerlendirilmesi’ (2018) 13 Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi 10 et seq. For more information about *Co-Mediation*, see also Keryn Foley, ‘To Co-Mediate or Not to Co-Mediate – That Is The Question’ (2017) 29(1) Bond Law Review (Bond L Rev) 95 et seq.; Baizeau and Kunz (n 10) 96.

87 See, Article 5 SRM. Mohs, Rusch and Bossard (n 14) 3. About the simplified procedure in the appointment of the mediator, see Section V, C below.

88 Art. 5(1) SRM. Mohs, Rusch and Bossard (n 14) 3.

## 2. Features and Roles of Mediators as per the Swiss Rules of Mediation (2019)

Mediation is an alternative method of dispute resolution where a third person named the “Mediator” assists the disputing parties to resolve the dispute among them<sup>89</sup>. For this reason, the personal features of the mediator who will be selected to enable an agreement among the parties bear significant importance<sup>90</sup>.

As per the quality of mediation activity, the mediator will always be unbiased and independent with regards to the parties in dispute<sup>91</sup>. In the provision of Art. 9(1) of the Swiss Rules of Mediation, it has been explicitly stated that the mediator should be unbiased and independent and that he should be suitable for being a mediator<sup>92</sup>. During the mediation period, if any situation arises that could affect the unbiased or independent state of the mediator, it is required that the mediator inform the parties immediately<sup>93</sup>. On the other hand, if the parties are informed about a situation that could raise doubts about the unbiased or independent state of the mediator but they give consent to the situation, the mediator may continue performing his mediation activities<sup>94</sup>.

### D. Mediation Procedure as per the Swiss Rules of Mediation

After approval and assignment of the mediator as per the Swiss Rules of Mediation, the Secretary within the body of the Swiss Chambers’ Arbitration Institution will deliver the mediation file to the mediator<sup>95</sup>. After the file is delivered by the Secretary to the mediator, as per the rules stipulated in the 11th and 15th articles of the Swiss Rules of Mediation, the mediation activity will be realized<sup>96</sup>.

89 Eiholzer (n 5) N 64 pp 17-18; Durand (n 3) 976; Main (n 3) 556; Ildır (n 4) 90. Mediation is a process in which a neutral third party (mediator) engages in face-to-face interviews with people who have a dispute between them (Nahrstadt (n 3) 68; Brain A Pappas, ‘Mindful Mediation’ (2019) 48 *Southwestern Law Review* (Sw L Rev) 353).

90 Işık, ‘Mediation’ (n 3) 69; Ildır (n 4) 90.

91 Rodney A Max, ‘Mediation in Public Policy’ (2016) 47 *Cumberland Law Review* (Cumb L Rev) 300; Dawson (n 3) 18; Sherif Elnegahy, ‘Can Mediation Deliver Justice’ (2017) 18 *Cardozo Journal of Conflict Resolution* 774; Pappas (n 89) 353; Schroeder (n 80) 250; Neil Andrews ‘Mediation: International Experience and Global Trends’ (2017) 4(2) *Journal of International and Comparative Law* (J Int’l & Comp L) 221; Durand (n 3) 985; Kekeç (n 3) 61 et seq.; Gren (n 3) 78. Indeed, in the provision of Article 9(1) of the Swiss Rules of Mediation, it is clearly stated that the mediator should be impartial, independent and suitable for mediation (See, Article 9(1) SRM).

92 Art. 9(1) SRM; cf. Art. 12(1) SRCM. Işık, ‘İsviçre’ (n 10) 460.

93 Art. 9(3) SRM.

94 However, it may be requested by the parties not to continue the mediation activity upon notification of the situations requiring them to be suspicious about the impartiality or independence of the mediator. It will inform the Secretariat that, if the parties do not consent to continue the activities of the mediator mutually, the mediator should be replaced in accordance with Article 7 of the Swiss Rules of Mediation (Art. 9(3) SRM). Indeed, in accordance with the provisions of articles 4 and 5 of the Swiss Rules of Mediation, in accordance with the provisions of the Swiss Rules of Mediation, in accordance with the provisions of Article 4 and 5 of the Swiss Rules of Mediation, if the mediator who is tasked mediator who is tasked with resolving the dispute between the parties is no longer accepted and longer accepted and is unable to fulfill his duty, in accordance with the provisions of Article 7 of the Swiss Rules of Mediation appointment of a mediator is accepted (Art. 7 SRM).

95 Art. 8(1) SRM. In such case, the mediation file will be forwarded to the mediator only after the payment of the administrative costs, in accordance with the Swiss Rules of Mediation, Annex B, which is in force at the time of the mediation request (Art. 8(2) SRM).

96 See: Articles 11-15 SRM.

## 1. Execution of Mediation Procedure

After the file is received from the Secretary, the mediator will contact the parties to organize a first meeting about how the mediation will proceed<sup>97</sup>. According to Article 11(2) of the Swiss Rules of Mediation, a short note summarizing the agreement of the parties regarding mediation and relevant arrangements (language, meeting time and place, application, participants, etc.) will be prepared by the mediator and a copy of it will be submitted to the parties and the Secretary<sup>98</sup>.

According to the 14th article of the Swiss Rules of Mediation, the place where the mediation activity will take place shall be the Secretary's office where the mediation request was submitted, unless determined otherwise by the parties<sup>99</sup>.

According to the Swiss Rules of Mediation of 2019, depending on the agreement of the parties, the mediator could organize separate meetings with the parties<sup>100</sup> (Art. 11(3) SRM). In a situation like this, unless the mediator has private authorization to disclose the information obtained from these separate meetings, he will apply strict confidentiality regarding information shared during the meetings<sup>101</sup> (Art. 11(3) SRM; Art. 13(2) SRM).

Unless it is decided otherwise among the parties, execution of mediation activity is subject to Swiss laws<sup>102</sup> (Art. 15(1) SRM). The mediator realizing the mediation activity facilitates information exchange among the parties and their viewpoints, and he encourages them to discover solutions that meet their requirements and interests<sup>103</sup>. In this way, the parties applying for mediation reveal their agreement requests in

97 Art. 11(2) SRM. Naón and Mason (n 13) § 50.07[3] p 50-07; Işık, 'İsviçre' (n 10) 461. On the first meeting with the party during the mediation process, see: Christopher W. Moore, *The Mediation Process, Practical Strategies for Resolving Conflict, (Arbuluculuk Süreci, Anlaşmazlık Çözümünde Pratik Stratejiler)* (Çev. Ed.: Tarkan Kaçmaz; Abbas Tümmüklü, Çev. Tarkan Kaçmaz; Mustafa Tercan) (4th edn, Nobel 2016) 187 et seq.; Gabrieli, Zimmerman and Albstein (n 3) 24.

98 Art. 11(2) SRM.

99 Art. 14 SRM.

100 Gabrieli, Zimmerman and Albstein (n 3) 32. Indeed, when separate meetings are held, the parties will also have the opinion that the mediator also see the balance between them (Gabrieli, Zimmerman and Albstein (n 3) 32).

101 Indeed, this is also a requirement of the principle of confidentiality. Regarding the privacy policy, see: Brown (n 3) 309; Sarah Rudolph Cole, 'Protecting Confidentiality in Mediation: A Promise Unfulfilled' (2006) 54 University of Kansas Law Review (U Kan L Rev) 1440; Ellen E Deason, 'The Need for Trust as a Justification for Confidentiality in Mediation: A Cross-Disciplinary Approach' (2006) 54 University of Kansas Law Review (U Kan L Rev) 1387 et seq.; Rachel K Ehrlich and Emily E Garrison, 'Questions Every Litigator Should Ask about Mediation Confidentiality' (2016) 21 Woman Advocate 12 et seq.; Ronan Feehily, 'Confidentiality in Commercial Mediation: A Fine Balance (Part 1)' (2015) 2015 Journal of South African Law (J S Afr L) 517 et seq.; Field and Wood (n 68) 144 et seq.; Foster and Prentice (n 6) 163 et seq.; Freedman and Prigoff (n 6) 37 et seq.; Christopher Honeyman and Bobbi McAdoo, 'Confidentiality in the Mediation Process: Perhaps...' (2002) 2 Journal of Alternative Dispute Resolution in Employment 9; Lee and Giesler (n 6) 295; McCrory (n 3) 444 et seq.; Rufenacht (n 3) 114 et seq.; Sarah Williams, 'Confidentiality in Mediation: Is It Encouraging Good Mediation or Bad Conduct' (2005) 2005 Journal of Dispute Resolution 215 et seq.; Durand (n 3) 985; Yazıcı Tıktık (n 10) 51 et seq.; Max (n 91) 299.

102 The relationship between the Swiss Chambers' Arbitration Institutions and any person involved in mediation (parties, representatives and consultants of the parties, mediators, experts, etc.) is subject to Swiss law (Art. 15(2) SRM).

103 Naón and Mason (n 13) § 50.07[3] p 50-16; Gabrieli, Zimmerman and Albstein (n 3) 38; Main (n 3) 556; Ildır (n 4) 88; Kekeç (n 3) 25; Yazıcı Tıktık (n 10) 43; Ali Yeşilirmak, *Doğrudan Görüşme, Arbuluculuk, Hakem-Bilirkişilik ve Tahkim (Türkiye'de Ticari Hayatın ve Yatırım Ortamının İyileştirilmesi İçin Uyuşmazlıkların Etkin Çözümünde)* (1th edn, On İki Levha 2011) 18.



order to resolve the dispute with the help of a mediator<sup>104</sup> as an independent and unbiased third party<sup>105</sup>. The task of the mediator is to convince the parties about the attractiveness of a resolution based on reconciliation and to assist them in resolving the dispute among them by reaching a mutual agreement<sup>106</sup>. Being different from a judge or arbitrator<sup>107</sup>, the mediator cannot make a decision that binds the parties<sup>108</sup>. The purpose of mediation is to help parties with disputes among themselves to resolve those disputes on their own<sup>109</sup>. For this reason, as long as negotiations continue in an efficient way, the mediator will bring the parties together and make efforts to facilitate negotiations among them<sup>110</sup>. In this regard, mediation is a voluntary method for resolving a dispute<sup>111</sup>. The mediator is not a *judge* or an *arbitrator*<sup>112</sup>. During the mediation activity, the mediator has an *unbiased* and *independent* role<sup>113</sup>.

According to the Swiss Rules of Mediation, parties wishing to resolve a dispute among themselves by means of mediation do not have to personally attend the mediation discussions<sup>114</sup>. Hence, as per the rules related to representation as stipulated in the 12th article of the Swiss Rules of Mediation, the parties could attend all the discussions personally, or, with regards to legal people, participation could be done by means of representatives being properly assigned and authorized for the relevant institution, the complete contact details of whom shall be transmitted to the mediator, the other party/parties, and the Secretary in written form<sup>115</sup> (Art. 12 SRM). Furthermore, parties wishing to resolve a dispute among themselves as per the Swiss Rules of Mediation could be represented by a legal consultant or an attorney whom they will select<sup>116</sup>.

If one of the parties having a dispute among themselves incurs any losses during the mediation activity, the people incurring damages could bring the issue of responsibility

104 Dawson (n 3) 18; Nahrstadt (n 3) 71; Pappas (n 89) 353; Schroeder (n 80) 250.

105 Riskin (n 72) 24; Schroeder (n 80) 250; Miruna Constantinescu and Monica Simona Corchiş, 'Are Mediation Clauses Binding and Mandatory?' (2017) 7 Juridical Tribune 55.

106 Eiholzer (n 5) N 64 p 17; Riskin (n 72) 24; Main (n 3) 556; Ildir (n 4) 88.

107 Max (n 91) 300.

108 Riskin (n 72) 22; Elnegahy (n 91) 774; Gabrieli, Zimmerman and Alstein (n 3) 28; John Birkle, 'Mediation: An Effective Arm of Alternative Dispute Resolution' (1993) 3 Res IPSA Loquitur 75; Durand (n 3) 976; Kekeç (n 3) 69.

109 Riskin (n 72) 22; Ildir (n 4) 90.

110 Durand (n 3) 976; Işık, 'Mediation' (n 3) 64.

111 Constantinescu and Corchiş (n 105) 53; Pappas (n 89) 353; Schroeder (n 80) 251; Martha E. Simmons, 'One Mediation Accessible to All' (2016) 23 Dispute Resolution Magazine 23; Andrews (n 91) 220; McCrory (n 3) 442; Baizeau and Kunz (n 10) 94; Durand (n 3) 976.

112 Max (n 91) 300.

113 Max (n 91) 300; Dawson (n 3) 18; Elnegahy (n 91) 774; Pappas (n 89) 353; Schroeder (n 80) 250; Işık, 'Mediation' (n 3) 460; Durand (n 3) 985; Gabrieli, Zimmerman and Alstein (n 3) 38, 41.

114 Işık, 'İsviçre' (n 10) 461.

115 Indeed, a parallel arrangement was envisaged in the 2007 Swiss Rules of Commercial Mediation. Because, in Article 19 of the 2007 Swiss Rules of Commercial Mediation, issues related to representation were expressed. According to the aforementioned arrangement, parties with disputes will be able to participate in all sessions in which the mediation activity takes place, through duly authorized representatives whose names and addresses will be communicated to the mediator, the other party and the Swiss Chambers' Commerce and Industry. In this context, a lawyer of their choice can also assist the parties during the mediation activity. See, SRCM Art. 19. See also Işık, 'İsviçre' (n 10) 461).

116 Art. 12 SRM; Art. 19 SRCM. Işık, 'İsviçre' (n 10) 461.

of the mediator to the agenda<sup>117</sup>. Hence, in regulations related to mediation rules, stipulations that the mediator will not incur responsibility could be raised<sup>118</sup>. In accordance, in the mediation rules foreseen by the Swiss Chambers' Arbitration Institution, regulations were introduced stating that the mediator will not be responsible for the activities that he realizes<sup>119</sup>. Hence, in the regulation of the 20th article of the Swiss Rules of Mediation of 2019, arrangements were made stipulating that in certain situations the mediator could be exempt from liability, similarly to the Swiss Rules of Commercial Mediation of 2007<sup>120</sup> (SRCM Art. 25).

According to the new arrangement foreseen in the 20th article of the Swiss Rules of Mediation of 2019, neither the Swiss Chambers' Arbitration Institution nor the chambers, personnel, managers, board members, mediators, arbitrators, members of the mediation consultancy council within the body of the institution, or expert people assigned by them shall be held responsible due to any actions or transactions originating from mediation activities carried out within the framework of the Swiss Rules of Mediation unless there is severe negligence or intention related to said actions or transactions<sup>121</sup>. As can be seen, according to the 20th article of the Swiss Rules of Mediation, in order for the mediator or any person taking part in the mediation activity to be held responsible, it is necessary that the occurring action or transaction be realized intentionally or as a result of severe negligence<sup>122</sup> (Art. 20 SRM).

## 2. Confidentiality<sup>123</sup>

One of the most important factors for mediation activity being preferred by the involved parties is the fact that it is carried out under the principle of confidentiality<sup>124</sup>. According to the 13th article of the Swiss Rules of Mediation of 2019, mediation activity being realized within the body of the Swiss Chambers' Arbitration Institution is confidential<sup>125</sup>. Accordingly, none of the observations, declarations, or proposals

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117 Kekeç (n 3) 210.

118 Ibid 210.

119 Işık, 'İsviçre' (n 10) 464-465.

120 See: 2019 Swiss Rules of Mediation (SRM) Art. 20. Cf.: Swiss Rules of Commercial Mediation Ar. 25. In the regulation that expresses the irresponsibility of the mediator from the mediation activity and which is foreseen under the article titled "exclusion from responsibility" in Article 25 of the 2007 Swiss Rules of Commercial Mediation (SRCM); it is regulated that any of the Swiss Chambers' Arbitration Institution or its employees, mediators or appointed experts will not be responsible for the action carried out pursuant to the Swiss Rules of Commercial Mediation unless the action has been deliberately or due to gross negligence (Işık, 'İsviçre' (n 10) 464).

121 Art. 20 SRM.

122 As a matter of fact, in the 25th article of the 2007 Swiss Rules of Mediation, it is clearly stated that in order to be mediation activity, the action or action that caused the damage must be done deliberately or as a result of heavy negligence.

123 For the definition of confidentiality, see Yazıcı Tıktık (n 10) 52; Kevin Gibson, 'Confidentiality in Mediation: A Moral Reassessment' (1992) 1992 Journal of Dispute Resolution 27; Durand (n 3) 985.

124 Yıldırım (n 11) 67; Durand (n 3) 975.

125 Mohs, Rusch and Bossard (n 14) 2. Mediation in Swiss Law has always been done according to the principle of confidentiality, see Meier (10) 13; Baizeau and Kunz (n 10) 94; Lack, 'Swiss ADR Rules' (n 23) 120; Işık, 'İsviçre' (n 10) 461.

made during the mediation activity or the documents prepared for mediation purposes can be disclosed other than for mediation purposes, and they cannot be used even in the case of arbitration without obtaining the consent of all people included in the mediation process<sup>126</sup>.

As can be seen, confidential communication during the mediation process is protected by the principle of confidentiality<sup>127</sup>. While mediation activity is being conducted, strict confidentiality should be ensured<sup>128</sup>. For this reason, all parties should have confidence that the mediation is confidential and that in the following arbitration processes the parties shall not be harmed, and they should be able to rely on any agreement reached on the basis that the arbitration shall be confidential; for this reason, arbitrators should not consider information and documents that are disclosed by violating such an agreement<sup>129</sup>. In a similar way, according to the Swiss Rules of Mediation, unless it is decided otherwise by the parties, a mediator cannot be assigned as an arbitrator, judge, expert, or representative or consultant of a party in a following case related to the same dispute or he cannot include one of the mediating parties after a request is made<sup>130</sup>.

According to the 2nd paragraph of the 13th article of the Swiss Rules of Mediation, mediation sessions are private<sup>131</sup>. In other words, as per the principle of confidentiality related to mediation activities, the mediator can have discussions with parties in different sessions and he has the opportunity to have private discussions with them<sup>132</sup>. Furthermore, with the consent of the mediator, the parties can agree that people other than themselves and representatives or consultants can participate in the sessions<sup>133</sup>.

The Swiss Chambers' Arbitration Institution will keep the main documents of the file for a minimum of 10 years after the approval of mediation (Art. 13(4) SRM). After this period is over, the Swiss Chambers' Arbitration Institution will destroy all documents, both physically and electronically<sup>134</sup>.

126 Art. 13(1) SRM. Mohs, Rusch and Bossard (n 14) 2.

127 Andrews (n 91) 222, 224; Constantinescu and Corchiş (n 105) 55. For more information about confidentiality see Brown (n 3) 309; Cole (n 101) 1440; Deason (n 101) 1387 et seq.; Ehrlich and Garrison (n 101) 12 et seq.; Feehily (n 101) 517 et seq.; Field and Wood (n 68) 144 et seq.; Foster and Prentice (n 6) 163 et seq.; Freedman and Prigoff (n 6) 37 et seq.; A.K.C. Koo and Yun Zhao, 'The Development of Legal Protection for Mediation Confidentiality in Hong Kong' (2011) 40 *Common Law World Review* 264-266; Gibson (n 123) 27 et seq.; Honeyman and McAdoo (n 101) 9; Lee and Giesler (n 6) 295; McCrory (n 3) 444 et seq.; Rufenacht (n 3) 114 et seq.; Williams (n 101) 215 et seq.; Durand (n 3) 985; Kekeç (n 3) 77 et seq.; Yazıcı Tıktık (n 10) 51 et seq.

128 Dhawan (n 3) 39. Confidentiality is considered as one of the main features of mediation (Andrews (n 91) 224). In fact, according to *Max*, confidentiality is the most important feature of mediation (Max (n 91) 299).

129 Baizeau and Kunz (n 10) 94; Mohs, Rusch and Bossard (n 14) 2. In the same direction, see, Schroeder (n 80) 258.

130 Art. 13(3) SRM. Mohs, Rusch and Bossard (n 14) 2.

131 Mohs, Rusch and Bossard (n 14) 2.

132 Gabrieli, Zimmerman and Albstein (n 3) 32.

133 Art. 13(2) SRM.

134 Art. 13(4) SRM.

## E. Ending of Mediation Period and Preparation of Documents Related to This Termination

The outcome in the majority of mediations is that the dispute is completely and finally resolved<sup>135</sup>. In the 1st paragraph of the 16th article of the Swiss Rules of Mediation, regulations are specified about the situations in which mediation activity will be ended<sup>136</sup>. According to the Swiss Rules of Mediation, the mediator will notify the Secretary about the ending of the mediation process, the date of termination, and whether the mediation has been ended completely or partially or without any conclusions with a written document<sup>137</sup>.

The outcome of a successful mediation procedure is a situation in which a reconciliation agreement is prepared as determined by the parties, which contains the particulars that are agreed upon<sup>138</sup>. This final solution among the parties will reflect an efficient and mutually applicable outcome with regards to both parties<sup>139</sup>. Since mediation is a voluntary process<sup>140</sup>, the reconciliation agreement will be binding on the parties as long as they accept it<sup>141</sup>. According to the regulation stipulated in the 5th paragraph of the 16th article of the Swiss Rules of Mediation, as per the request of the parties or mediator, the Secretary will provide a mediation document for the parties and mediator, confirming that mediation has taken place and stating whether reconciliation was reached or not<sup>142</sup>.

135 Nahrstadt (n 3) 68; Melis Taşpolat Tuğsavul, 'Arabuluculuk Faaliyeti Sonunda Varılan Anlaşmanın Hukuki Niteliği', (2019) 2 Galatasaray Üniversitesi Hukuk Fakültesi Dergisi 334; Kekeç (n 3) 194.

136 According to Article 16(1) of the Swiss Rules of Mediation revised in 2019, mediation will end in the following cases: "1. A mediation under the Rules shall be deemed to have ended:

(a) upon the signing by all parties of a settlement agreement putting an end to the dispute; (b) after 90 days, if a defective or incomplete Request has been submitted to the Secretariat, and the Requesting Party(ies) have not timely remedied the defect as requested by the Secretariat; (c) at any time after the mediator has provided the parties with a written note, pursuant to Article 11(2) of the Rules, if a party noti es the mediator and the Secretariat in writing of its decision to terminate the mediation and the remaining parties do not wish to continue without that party; (d) at any time after the mediator has provided the parties with a written note, pursuant to Article 11(2) of the Rules, if, in the opinion of the mediator, further efforts would not contribute to a resolution of the dispute and he/she noti es the parties and the Secretariat in writing of his/her decision to terminate the mediation; (e) upon expiration of any time limit set by the parties or the mediator for the resolution of the dispute, if not extended by agreement of all parties and the mediator; (f) in the event of non-payment, by the parties, of the deposits according to Article 25 of the Rules, or of the SCAI administrative costs according to Section 2 of Appendix B of the Rules, within the time limit set respectively by the mediator or by the Secretariat."

137 Art. 16(2) SRM. In this context, in multilateral mediation, if one party or some parties decide to withdraw from mediation:

(a) The remaining parties inform the Secretariat in writing whether they wish to mediate immediately and if so, if they wish to continue mediation with the appointed mediator;

(b) The mediator immediately notifies the Secretariat in writing that the party has withdrawn from mediation and specifies whether to agree to continue mediation with the remaining parties (Art. 16(3) SRM).

138 Zeller and Trakman (n 25) 449. For more information about scope of the agreement see Max (n 91) 300.

139 Constantinescu and Corchiş (n 105) 55.

140 Mediation is a voluntary process, *see*: Constantinescu and Corchiş (n 105) 53; Pappas (n 89) 353; Schroeder (n 80) 251; Simmons (n 111) 23; Andrews (n 91) 220; McCrory (n 3) 442; Baizeau and Kunz (n 10) 94; Ömer Ekmekçi, Muhammet Özekes, Murat Atalı and Seven, Vural, *Hukuk Uyumazlıklarında Arabuluculuk* (2th edn, On İki Levha 2019) 28 et seq.; Kekeç (n 3) 70; Emond (n 2) 617; Gren (n 3) 76.

141 Dhawan (n 3) 38.

142 Art. 16(5) SRM.

## V. Fundamental Changes Introduced with the New Swiss Rules on Mediation Being Reviewed Following The 2019 Revision

### A. General and Structural Changes Made to the Swiss Rules of Mediation (2019)

In relation to the Swiss Rules of Mediation being reviewed with the 2019 revision submitted by the Swiss Chambers' Arbitration Institution, plain, clear, and simplified language has been preferred<sup>143</sup>. At the same time, when compared with the Swiss Rules of Commercial Mediation (SRCM), the revision made on 1 July 2019 for the Swiss Rules of Mediation has aimed to facilitate usage of mediation in various types of disputes<sup>144</sup>. For this reason, the word “commercial” that was used in the Swiss Rules of Commercial Mediation has been removed from the new Swiss Rules of Mediation as reviewed by the Swiss Chambers' Arbitration Institution following the 2019 revision to emphasize that the rules can be used for both commercial and non-commercial disputes<sup>145</sup>. Therefore, the rules could be applied for mediation when there are disputes related to *family law*, *commercial law*, and *business law*<sup>146</sup>.

### B. Role of Mediation According to the Swiss Rules of Mediation (Art. 10 SRM)

The objectives of mediation activity will vary according to the role of the mediator or the style of mediation<sup>147</sup>. It is accepted that during the mediation process a single type of approach is not followed<sup>148</sup>. When compared with the 2007 Swiss Rules of Commercial Mediation, the Swiss Rules of Mediation of 2019 clarify whether the mediator assisting to resolve the dispute among the parties can express his opinions or not and whether it is possible for him to make any proposals if requested by the parties<sup>149</sup>. This particular issue has been clearly addressed in the 10th article of the Swiss Rules of Mediation of 2019<sup>150</sup>. In this context, Article 10 of the Swiss Rules of Mediation with the “*Role of Mediator*” sidebar is as follows:

143 Mohs, Rusch and Bossard (n 14) 1.

144 Accordingly, mediation mostly involves family law, commercial law, labor law, etc. It is an alternative dispute resolution method that is frequently applied by the parties in the case of disputes related to. The Swiss Rules of Mediation (2019) will apply to all mediation procedures in which the parties whose disputes are openly agree to mediate in accordance with the said rules. See, Section IV, A above.

145 Mohs, Rusch and Bossard (n 14) 1. In our opinion, removing the word “*Commercial*” mentioned in the Swiss Rules of Commercial Mediation clearly shows that it covers all private law disputes in terms of mediation rules adopted by the Swiss Chambers' Arbitration Institution after the 2019 revision.

146 Field and Wood (n 68) 143; Crowe (n 69) 147.

147 Crowe (n 69) 147; Durand (n 3) 979.

148 Robert A. Baruch Bush, ‘A Pluralistic Approach to Mediation Ethics: Delivering on Mediation’s Different Promises’ (2019) 34 *Ohio State on Dispute Resolution* 462; Nahrstadt (n 3) 71. Indeed, according to *Nahrstadt*, when it comes to mediation style, there are basically two types. These are “*Evaluative mediation*” and “*Facilitative mediation*”. For more information about “*evaluative mediation*” and “*facilitative mediation*” see Seda Özümücü, ‘Arabulucunun Rolü Kolaylaştırıcı ve Değerlendirici Arabuluculuk’ (2013) 73 *İstanbul Üniversitesi Hukuk Fakültesi Mecmuası (İÜHFİM)* 1369-1389. For more information about mediation models, see Gabrieli, Zimmerman and Alstein (n 3) 5-8; Koo and Zhao (n 127) 263 et seq.; Durand (n 3) 979; Kekeç (n 3) 238-245.

149 For the role of the mediator under the 2007 Swiss Rules of Commercial Mediation, see Baizeau and Kunz (n 10) 97.

150 Mohs, Rusch and Bossard (n 14) 2.

“1. The mediator shall assist the parties in their negotiations, with a view to reaching a mutually acceptable and satisfactory resolution of their dispute. The mediator has no authority or power to impose a settlement on the parties.

2. The mediator and the parties shall be guided by the principles of fairness, party autonomy, and mutual respect.”

Within the framework of the Swiss Rules of Mediation of 2019, the mediator does not have the authorization to make any solution proposals to the parties wishing to resolve the dispute among themselves<sup>151</sup>. Hence, the mediator will provide assistance in order for the disputes among parties to be resolved in an acceptable and satisfactory way<sup>152</sup> (Art. 10 SRM). During mediation discussions, as the parties communicate with each other, it will be possible for them to understand their relevant interests and common aspects better and to see and evaluate strong and weak points from a legal point of view, as well as the outcomes that may arise if no solution is created<sup>153</sup>.

The role of the mediator during mediation activity bears importance not only to guide the parties but also to ensure compliance with ethical requirements at the same time<sup>154</sup>. In this respect, the parties wishing to apply for mediation as per the Swiss Rules of Mediation of 2019 and the mediators will act in accordance with principles of justice, autonomy of parties, and mutual respect<sup>155</sup>.

### **C. Making Arrangements for a Simplified Procedure for Assignment of Mediators (Art. 5 SRM)**

A new feature introduced with the Swiss Rules of Mediation of 2019 is the “simplified designation procedure” being accepted for the assignment of mediators<sup>156</sup>. The simplified designation procedure is important as it enables a mediator to be assigned more quickly and for time to be saved while resolving disputes among parties<sup>157</sup>. A new aspect accepted for the assignment of mediators as a result of the revisions made to the Swiss Rules of Mediation is the simplified designation procedure stipulated in

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151 Art. 10 SRM.

152 Eiholzer (n 5) N 64 p 17; Riskin (n 72) 24; Birkle (n 108) 76.

153 Riskin (n 72) 26; Birkle (n 108) 77.

154 Bush (n 148) 484.

155 Art. 10(2) SRM.

156 Simplified Designation Procedure is regulated in the 5th article of the revised Swiss Rules of Mediation proposed by the Swiss Chambers' Arbitration Institutions:

*“1. The Simplified Designation Procedure shall apply for the designation of the mediator if the parties jointly agree, or do not object to its application in cases where the amount in dispute is below CHF 50,000. 2. Whenever the Simplified Designation Procedure applies, the Secretariat shall, in accordance with Article 6: (a) confirm the mediator jointly designated by the parties; or (b) appoint one mediator taking into account the parties' description (if any) of their preferences or desired qualifications of the mediator as submitted to the Secretariat pursuant to Article 2(2)(d) of the Rules, but without submitting a list of mediators to the parties.”*

157 Mohs, Rusch and Bossard (n 14) 3.

the 5th article of the Swiss Rules of Mediation<sup>158</sup>. According to the regulation of the 5th article of the Swiss Rules of Mediation, a simplified designation procedure will be applied in situations in which parties have reached an agreement or in cases in which the amount of dispute is below the value of 50,000 Swiss Francs (CHF) and the parties do not raise objections<sup>159</sup>. According to the simplified designation procedure, the Secretary of the Swiss Chambers' Arbitration Institution approves the mediator being assigned jointly by the parties, or, if the parties have a preference, by considering the explanations and the requested qualities, the Secretary can directly assign someone as the mediator<sup>160</sup>. In this regard, the simplified designation procedure stipulated in the 5th article of the Swiss Rules of Mediation allows a mediator to be assigned more quickly and for the dispute to be resolved faster<sup>161</sup>.

#### **D. Mediation Costs and Amendment Related to the Advisory Council for Mediation (Art. 24(4) SRM)**

Alternative dispute resolution methods including mediation are cheaper when compared with opening cases<sup>162</sup>. Although mediation is a cheap alternative dispute resolution method when compared with government judgments, it causes certain costs to arise<sup>163</sup>. Parties wishing to resolve disputes among themselves by means of mediation within the body of the Swiss Chambers' Arbitration Institution are obliged to pay for certain costs as per the regulations stipulated in the 21st and 26th articles of the Swiss Rules of Mediation<sup>164</sup>. Costs related to the Swiss Rules of Mediation as stipulated by the Swiss Chambers' Arbitration Institution show variations<sup>165</sup>. As a result of mediation activity, mediators could gain the right to obtain certain wages<sup>166</sup>. In this respect, another new aspect introduced by the Swiss Rules of Mediation of 2019 is that when there is a disagreement regarding the wages of the mediator, an Advisory Council for Mediation is established in order to provide assistance for resolving such disputes<sup>167</sup> (Art. 24(4) SRM). Furthermore, it will be seen with time whether the Advisory Council for Mediation will become an authority dealing with dispute resolutions regarding issues other than the wages of mediators<sup>168</sup>.

158 Ibid 3.

159 Art. 5(1) SRM.

160 Art. 5(2) SRM.

161 Mohs, Rusch and Bossard (n 14) 3.

162 Nahrstadt (n 3) 68; M Gino Sr Brogdon, 'Most Common Mistakes in Mediation' (2016) 45 Brief 51; Constantinescu and Corchiş (n 105) 55; Durand (n 3) 975; Yıldırım (n 11) 64; Kekeç (n 3) 89.

163 Yazar (n 26) 151. Mediation process is not a free activity (Mert Namli, 'Belçika Hukukunda Arabuluculuk Sistemi' in *Arabuluculuk Sempozyumu* 11 Aralık 2008 (İstanbul Barosu Yayınları 2008) 110).

164 Articles 21-26 SRM. As a result of the mediation process, mediators will be entitled to a certain fee (Işık, 'Mediation' (n 3) 78). Alternative dispute resolution methods, including mediation, are cheaper compared to filing a lawsuit (Nahrstadt (n 3) 68; Brogdon (n 162) 51; Constantinescu and Corchiş (n 105) 55).

165 Baizeau and Kunz (n 10) 97; Işık, 'İsviçre' (n 10) 465.

166 Işık, 'Mediation' (n 3) 78.

167 See Art. 24(4) SRM.

168 Mohs, Rusch and Bossard (n 14) 4.

## E. Dispute Resolution Methods Including Mediation as Stipulated in the New Swiss Rules of Mediation and Arbitration Together (Arts. 18-19 SRM)

### 1. In General

As alternative dispute resolution methods have developed throughout the world, the number of methods that can be applied for the resolution of disputes is increasing with time<sup>169</sup>. In this respect, alternative dispute resolution methods for which parties can apply if they cannot resolve their disputes among themselves show variations today<sup>170</sup>. As alternative dispute resolution methods are developing and yielding new varieties, the idea to combine arbitration with other alternative dispute resolution procedures has emerged<sup>171</sup>. Today “*hybrid methods*” (or “*hybrid processes*”), formed by combining two or more of the alternative dispute resolution methods, are preferred by many parties<sup>172</sup>. In this regard, alternative dispute resolution methods can be defined in the form of “*mediation-arbitration*” (Med-Arb) or “*arbitration-mediation*” (Arb-Med)<sup>173</sup>. Dispute resolution methods in the form of mediation-arbitration are also defined as “*graded*” or “*arbitration agreements with multiple stages*”<sup>174</sup>. Decisions today are frequently made by parties to apply procedures outside the court, such as having reconciliation before arbitration, or mediation and reconciliation<sup>175</sup>. In this way, while the parties resolve the dispute among themselves, they aim to improve efficiency and gain certain advantages by incurring fewer damages<sup>176</sup>.

The Swiss Rules of Mediation proposed by the Swiss Chambers’ Arbitration Institution stipulate regulations that support the relationship between mediation and arbitration as an alternative dispute resolution method<sup>177</sup>. In the Swiss Rules of Commercial Mediation of 2007, regulations related to dispute resolution methods including mediation and arbitration together were applied within the framework of the principles foreseen by SRCM Arts. 23-24<sup>178</sup>. As in the case of the Swiss Rules

169 Işık, ‘İsviçre’ (n 10) 453.

170 Tang Houzhi, ‘Is There an Expanding Culture that Favors Combining Arbitration with Conciliation or Other ADR Procedures?’, in Albert Jan van den Berg (eds.), *International Dispute Resolution: Towards an International Arbitration Culture, ICCA Congress Series* (Kluwer Law International 1998) 108; Nuray Ekşi, *Tahkim Öncesi Uyuşmazlık Çözüm Usulleri ve Bu Usuller Tüketilmeden Tahkime Başvurulmasının Sonuçları* (1th edn, Beta 2015) 4; Işık, ‘İsviçre’ (n 10) 453; Nosyрева (n 7) 9.

171 Houzhi (n 170) 108.

172 Ekşi (n 170) 4; Işık, ‘İsviçre’ (n 10) 454; Houzhi (n 170) 108; Nosyрева (n 7) 9. “*Mini-trial, early neutral evaluation, med-arb, rent-a-judge and ombudsman*” are hybrid alternative dispute resolution methods (Nosyрева (n 7) 9).

173 Eiholzer (n 5) 15-29; Ekşi (n 170) 4; Işık, ‘İsviçre’ (n 10) 454.

174 Cemile Demir Gökyayla, ‘Arabuluculuk ve Tahkimi Bir Arada İçeren Uyuşmazlık Çözüm Yolu’ (2019) 77(2) İstanbul Hukuk Mecmuası 584.

175 Mine Tan Dehmen, ‘Tahkim Öncesi Müzakere ya da Uzlaştırma Yollarının Tüketilmemiş Olmasının Tahkim Yargılamasına Etkisi’ (2005-2006) 25 (1-2) Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 451; Ekşi (n 170) 15.

176 Tan Dehmen (n 175) 451. For this reason, clauses envisaging the consumption of some stages before arbitration are encountered in practice. The doctrine also uses these clauses before the arbitration stages (Ekşi (n 170) 15).

177 Naón and Mason (n 13) § 50.07[4] p 50-17; Lack, ‘Swiss ADR Rules’ (n 23) 121; Baizeau and Kunz (n 10) 94; Işık, ‘İsviçre’ (n 10) 463-464.

178 Naón and Mason (n 13) § 50.07[4] p 50-17; Işık, ‘İsviçre’ (n 10) 463-464; Baizeau and Moss (n 53) 210.



of Commercial Mediation of 2007, parties wishing to apply for arbitration during mediation activity or those wishing to apply for mediation during arbitration activity have the opportunity to resolve their disputes by means of arbitration/mediation on the condition that they comply with the regulations of Arts. 18-19 in the new Swiss Rules of Mediation of 2019 (SRM)<sup>179</sup>. In our opinion, the fact that provisions have been stipulated about mediation and arbitration in both the Swiss Rules of Commercial Mediation of 2007 and the Swiss Rules of Mediation of 2019 emphasizes the close bond between mediation and arbitration among the alternative dispute resolution methods<sup>180</sup>.

## 2. “Mediation-Arbitration” (Med-Arb) as Stipulated in the Swiss Rules of Mediation of 2019

Mediation-arbitration (*Med-Arb*) is a dispute resolution method wherein parties having a dispute among themselves agree with an unbiased third person to resolve that dispute, and in the event that they cannot resolve the dispute by means of mediation, they can apply for the arbitration method<sup>181</sup>. As mediation-arbitration enables the parties to resolve the dispute among themselves in a fast, effective, and less costly way, it is a dispute resolution method having many advantages<sup>182</sup>. In the mediation-arbitration method, when parties applying for mediation come to a point at which they understand that they cannot resolve their dispute with mediation, they can continue with arbitration and receive a final and binding decision with the mediation of referees<sup>183</sup>. For this reason, while mediation and arbitration are stipulated together, the fact that a final and binding decision will be issued as a result of mediation creates an advantageous situation with respect to the parties<sup>184</sup>.

If the parties cannot resolve their dispute with the Swiss Rules of Mediation related to mediation as accepted by the Swiss Chambers’ Arbitration Institution, they will also have the opportunity to continue with the arbitration method<sup>185</sup>. Furthermore, in the 18th article of the revised Swiss Rules of Mediation of 2019, a dispute resolution

179 See Articles 23-24 SRM; Articles 18-19 SRM.

180 See Section I. Introduction above.

181 Demir Gökyayla (n 174) 580; Yazar (n 26) 31. Parties with disputes will primarily apply for mediation through alternative dispute resolution methods; However, if the dispute cannot be resolved through mediation, the agreements that they have agreed to continue with the dispute resolution method are called “*Mediation-Arbitration*” (Med-Arb). For more information about “*mediation-arbitration*” see: Demir Gökyayla (n 174) 579 et seq. Dispute resolution in the form of mediation-arbitration is also referred to as “*cascading*” or “*multi stage arbitration agreements*” (Demir Gökyayla (n 174) 584).

182 Işık, ‘İsviçre’ (n 10) 464; Demir Gökyayla (n 174) 580; Ali Yeşilirmak, ‘Uyuşmazlıkların Arabuluculuk ve Tahkim Yollarının Birlikte Kullanılarak Çözümü (Med-Arb)’, in Ersin Erdoğan (ed.) *Arabuluculuğun Geliştirilmesi Uluslararası Sempozyumu* (6-7 Aralık 2018) 184; Yazar (n 26) 31.

183 Yazar (n 26) 32; Yeşilirmak, ‘Med-Arb’ (n 182) 184; Demir Gökyayla (n 174) 580.

184 Demir Gökyayla (n 174) 580-581; Yazar (n 26) 32; Yeşilirmak, ‘Med-Arb’ (n 182) 184.

185 Naón and Mason (n 13) § 50.07[4] p 50-17.

method in the form of “mediation-arbitration” (*Med-Arb*) has been specified<sup>186</sup>. In accordance with the 1st paragraph of the 18th article with the side heading of “Recourse to arbitration” in the Swiss Rules of Mediation of 2019, the disputing parties can apply at any time to the Swiss Chambers’ Arbitration Institution and agree to apply for the arbitration method in accordance with the Swiss Rules of International Arbitration (*Swiss Rules*) as stipulated by the Swiss Chambers’ Arbitration Institution<sup>187</sup>. In this context, as per Art. 18(1) of the Swiss Rules of Mediation, both parties of the dispute can start arbitration processes by making a notification of arbitration as per the 3rd article<sup>188</sup> of the Swiss Rules of International Arbitration stipulated by the Swiss Chambers’ Arbitration Institution in accordance with the specified rules<sup>189</sup>. In such a situation, if the parties having a dispute among themselves can resolve their dispute during the arbitration judgment, any relevant provisions specified under the

186 About *Med-Arb* see: Hochstrasser and Fuchs, BSK IPRG (n 32) N 329 et seq.; Demir Gökyayla (n 174) 580 et seq.; Baizeau and Kunz (n 10) 94; Houzhi (n 170) 108-109; Ildir (n 4) 100 et seq.

187 Art. 18(1) SRM.

188 As a matter of fact, the principles regarding the arbitration notification stipulated in the paragraphs 1 to 6 of the article titled “Notice of Arbitration and Answer to the Notice of Arbitration” of the Swiss Rules for International Arbitration stipulated by the Arbitration Institution of the Swiss Chambers are as follows:

“1. The party initiating arbitration (hereinafter called the “Claimant” or, where applicable, the “Claimants”) shall submit a Notice of Arbitration to the Secretariat at any of the addresses listed in Appendix A.

2. Arbitral proceedings shall be deemed to commence on the date on which the Notice of Arbitration is received by the Secretariat.

3. The Notice of Arbitration shall be submitted in as many copies as there are other parties (hereinafter called the “Respondent” or, where applicable, the “Respondents”), together with an additional copy for each arbitrator and one copy for the Secretariat, and shall include the following: (a) A demand that the dispute be referred to arbitration; (b) The names, addresses, telephone and fax numbers, and e-mail addresses (if any) of the parties and of their representative(s); (c) A copy of the arbitration clause or the separate arbitration agreement that is invoked; (d) A reference to the contract or other legal instrument(s) out of, or in relation to, which the dispute arises; (e) The general nature of the claim and an indication of the amount involved, if any; (f) The relief or remedy sought; (g) A proposal as to the number of arbitrators (i.e. one or three), the language, and the seat of the arbitration, if the parties have not previously agreed thereon; (h) The Claimant’s designation of one or more arbitrators, if the parties’ agreement so requires; (i) Confirmation of payment by check or transfer to the relevant account listed in Appendix A of the Registration Fee as required by Appendix B (Schedule of Costs) in force on the date the Notice of Arbitration is submitted.

4. The Notice of Arbitration may also include:

(a) The Claimant’s proposal for the appointment of a sole arbitrator referred to in Article 7; (b) The Statement of Claim referred to in Article 18.

5. If the Notice of Arbitration is incomplete, if the required number of copies or attachments are not submitted, or if the Registration Fee is not paid, the Secretariat may request the Claimant to remedy the defect within an appropriate period of time. The Secretariat may also request the Claimant to submit a translation of the Notice of Arbitration within the same period of time if it is not submitted in English, German, French, or Italian. If the Claimant complies with such directions within the applicable time-limit, the Notice of Arbitration shall be deemed to have been validly filed on the date on which the initial version was received by the Secretariat.

6. The Secretariat shall provide, without delay, a copy of the Notice of Arbitration together with any exhibits to the Respondent.”

See: [https://www.swissarbitration.org/files/50/Swiss%20Rules%202019/Swiss%20Rules%20of%20International%20Arbitration%202012\\_2019%20English-Turkish%20revis....pdf](https://www.swissarbitration.org/files/50/Swiss%20Rules%202019/Swiss%20Rules%20of%20International%20Arbitration%202012_2019%20English-Turkish%20revis....pdf) (Last Online Access: 26 December 2019).

189 Art. 18(1) SRM.

conditions of the 34th article<sup>190</sup> with the heading of “*Settlement or Other Grounds for Termination*” as stated in the Swiss Rules of International Arbitration shall be applied<sup>191</sup>. Again, according to the regulation of Art. 18(2) of the Swiss Rules of Mediation, the parties can make a written agreement to resolve all or any part of their dispute in accordance with other rules of arbitration<sup>192</sup>.

### 3. “Arbitration-Mediation” (Arb-Med) as Stipulated in the Swiss Rules of Mediation of 2019

If the parties cannot resolve the dispute among themselves as per the new Swiss Rules of Mediation related to arbitration accepted by the Swiss Chambers’ Arbitration Institution, they will also have the opportunity to continue with the mediation method<sup>193</sup>. Hence, in the 19th article of the revised Swiss Rules of Mediation of 2019, regulations related to mediation during arbitration processes were made<sup>194</sup>. In this context, as per Art. 19(1) of the Swiss Rules of Mediation of 2019, any of the parties or an arbitrator could assert that the parties wish to resolve the conflict among themselves in an amicable way by having a mediation agreement during the arbitration judgment that takes place within the body of the Swiss Chambers’ Arbitration Institution<sup>195</sup>. In such a case, after the Secretary within the Swiss Chambers’ Arbitration Institution receives the request and registry fee from the parties wishing to apply for mediation during the arbitration judgment process, the process will be continued with the selection of mediation in conformity with the rules related to “Selection of Mediator(s)”<sup>196</sup> (Arts. 3-8 SRM) as stipulated in the 2nd part of the Swiss Rules of Mediation of 2019<sup>197</sup>.

190 As a matter of fact, the principles stipulated by article 34 of the Swiss Rules of International Arbitration, which are envisaged by the Swiss Chambers’ Arbitration Institution, under the heading “*Settlement or other grounds for termination*”, are as follows:

“1. 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 the parties and accepted by the arbitral tribunal, 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.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in Article 34(1), the arbitral tribunal shall give advance notice to the parties that it may issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order, unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties and to the Secretariat. Where an arbitral award on agreed terms is made, Articles 32(2) and (4) to (6) shall apply”.

191 Art. 18(1) SRM. Baizeau and Moss (n 53) 210.

192 Art. 18(2) SRM. Naón and Mason (n 13) § 50.07[4] p 50-17

193 Naón and Mason (n 13) § 50.07[4] p 50-17.

194 Art. 19 SRM.

195 Article 19(1) of the Swiss Rules of Mediation revised by the Swiss Chambers’ Arbitration Institution provided as follows:

“1. In all arbitral proceedings pending before SCAI, a party or the arbitrator(s) may suggest that the parties seek to amicably resolve the dispute, or any part of it, by recourse to mediation.

2. If the parties to an arbitration agree to mediation under the Rules, the Secretariat, upon receipt of the Request and the registration fee, shall proceed with the selection of the mediator pursuant to Section II of the Rules.”

196 For more information about the “Selection of mediator(s)” (Art. 3-8 SRM), See Section IV, C, 1 above.

197 Art. 19(2) SRM.

We would like to state that there are no regulations related to this issue in the Swiss Rules of International Arbitration<sup>198</sup>. Furthermore, this should not be deemed a deficiency in our opinion, because there is no doubt that arbitrators or parties can propose to apply for the mediation method when the arbitration judgment process is taking place in accordance with the Swiss Rules of International Arbitration.

#### **F. Preparation of Documents Related to the Termination of Mediation Activity (Art. 16(5) SRM)**

In accordance with the new regulation stipulated in the 5th paragraph of the 16th article of the Swiss Rules of Mediation and as per the requests of parties or mediators, the Secretary will provide a mediation certificate to parties and mediators confirming that mediation has taken place and stating whether it caused a reconciliation to take place or not<sup>199</sup>. The Secretary could request that parties or mediators submit any documents considered appropriate to finalize the mediation process<sup>200</sup>. Such documents will be in English, German, French, or Italian, or they could be officially translated into one of these languages<sup>201</sup>.

#### **G. Reconciliation of Parties Following the Mediation Activity and Documentation of Agreement of Settlement (Art. 17(2)(3) SRM)**

If the parties reach an agreement as a result of mediation activity, they can be issued a certificate of settlement<sup>202</sup>. With the new regulation introduced by the 17th article of the Swiss Rules of Mediation, this point has been clearly explained<sup>203</sup>. According to the 1st paragraph of the 17th article of the Swiss Rules of Mediation, unless it is decided otherwise in writing by the parties, reconciliation will not be reached until it is concluded in writing and signed by the relevant parties<sup>204</sup>.

If it is requested by the parties and if it is submitted with an original signed copy of the settlement agreement, the Secretary could give approved copies of the settlement agreement to the parties<sup>205</sup>. According to the 3rd paragraph of the 17th article of the Swiss Rules of Mediation, if it is requested by the parties and if the mediator confirms that he has witnessed the parties signing the settlement agreement, or if the

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198 See: Swiss Rules for International Arbitration (Articles 1-45 SRIA).

199 Mohs, Rusch and Bossard (n 14) 3.

200 Art. 16(5) SRM.

201 Art. 16(5) SRM.

202 Birkle (n 108) 78-80; Işık, 'Mediation' (n 3) 76. As a matter of fact, the parties have an interest in preparing a document that they have agreed. In this regard, it is important to prepare a viable settlement agreement that ends the dispute between the parties (Renate Dendorfer-Ditges and Philipp Wilhelm, 'Mediation in a Global Village: Legal Complexity of Cross-Border Mediation in Europe' (2017) 5 Yearbook on International Arbitration 242).

203 Mohs, Rusch and Bossard (n 14) 3.

204 Art. 17(1) SRM.

205 Art. 17(2) SRM.

parties sign the settlement agreement in front of the Secretary, the Secretary could give the parties a certificate of conformity with the original in relation to the settlement agreement<sup>206</sup>. In such a situation, the Secretary could request that the parties or the mediator submit a document considered to be appropriate for the approval of the settlement agreement<sup>207</sup>. Such a document could be in English, German, French, or Italian or could be officially translated to one of these languages<sup>208</sup>. It will be necessary that the document presenting the settlement agreement reached as a result of mediation meet certain conditions in such a way as to allow it to serve in correspondence to the financial and applicable decision of a court reached by mediation<sup>209</sup>.

## VI. Impact of the Singapore Convention on The Swiss Rules of Mediation and the Amendments that Were Made

### A. In General

In the revision of the mediation rules within the body of the Swiss Chambers' Arbitration Institution, developments related to UNCITRAL (*United Nations Convention on International Settlement Agreements Resulting from Mediation or "Singapore Convention on Mediation"*; New York, 2018), which was approved on 25 June 2018 and which was open for signatures on 7 August 2019, have been effective<sup>210</sup>. For this reason, we will now discuss the Singapore Convention, and the amendments accepted within the context of harmonizing the new Swiss Rules of Mediation following the 2019 revision with the Singapore Convention shall be identified.

### B. Singapore Convention on Mediation: An Overview

It will be beneficial to use mediation if any disputes arise in relation to contracts being made on foreign soil or in relation to an agreement concluded outside of national borders, as a method of resolution with regards to the negotiations to be made<sup>211</sup>. This will also bring the execution of international agreement documents that are obtained by means of mediation onto the agenda<sup>212</sup>. Furthermore, the fact that there are no regulations enabling agreement documents obtained as a result of mediation activity

206 Mohs, Rusch and Bossard (n 14) 3.

207 Ibid 3.

208 Art. 17(4) SRM.

209 Dawson (n 3) 19. For the same direction See: Dendorfer-Ditges and Wilhelm (n 202) 242.

210 For the English text of UNCITRAL, *United Nations Convention on International Settlement Agreements Resulting from Mediation*, See [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation\\_convention\\_v1900316\\_eng.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf) (Last Online Access: 20 February 2020).

211 Dawson (n 3) 19.

212 Zeller and Trakman (n 25) 449; Erdoğan (n 26) 190.

to be recognized in foreign countries constituted a problem and a deficiency<sup>213</sup>. For this reason, UNCITRAL or the “Singapore Convention on Mediation” was established, aiming to facilitate the execution of international agreement documents accepted as a result of mediation activity<sup>214</sup>.

The United Nations agreement (“*Singapore Convention on Mediation*” or “*Singapore Convention*”) accepted with regards to international peace agreements concluded as a result of mediation was open to signatures on 7 August 2019 and has been signed by 46 countries, including Turkey<sup>215</sup>. The Singapore Convention on Mediation provides the impact of the New York Convention of 1958 in relation to the recognition and enforcement of decisions of foreign referees with regards to mediation<sup>216</sup>. The Singapore Convention also enables the application of reconciliation agreements related to mediation that are concluded in writing outside of national borders with the aim of resolving commercial disputes<sup>217</sup>. With the Singapore Convention, a settlement agreement concluded as a result of mediation gains a new status and becomes easily executable in other countries, as well<sup>218</sup>. For this reason, the Singapore Convention, by facilitating the execution of reconciliation agreements with regards to commercial disputes, will provide a significant contribution for the development of the commercial mediation process<sup>219</sup>.

### C. Amendments Made Within the Context of Harmonizing the New Swiss Rules of Mediation with the Singapore Convention

Developments seen since 2018 in relation to the Singapore Convention, which was designed to facilitate the execution of international agreement documents obtained by means of mediation, have been effective for the revision and review of the Swiss Rules of Commercial Mediation of 2007 as stipulated by the Swiss Chambers’ Arbitration

213 Ekşi (n 170) 9; Zeller and Trakman (n 25) 449; Erdoğan (n 26) 190. Recognition and enforcement of the agreement document obtained after the mediation activity in a manner similar to the regulation adopted in terms of recognition and enforcement of the 1958 New York Convention (*The Convention on the Recognition and Enforcement of Foreign Arbitral Awards*) with the Singapore Convention (Erdoğan (n 26) 189; Yazar (n 26) 154).

214 Yazar (n 26) 154; Erdoğan (n 26) 190; Chua (n 25) 1; Zeller and Trakman (n 25) 450; Dhawan (n 3) 40.

215 Özsunay, ‘Singapur Sözleşmesi’ (n 25) 31; Yazar (n 26) 153; Kaya (n 26) 982. The countries that signed the Singapore Convention are: “*Afganistan, Amerika Birleşik Devletleri, Belarus, Benin, Bruney Sultanlığı, Çin, Demokratik Kongo Cumhuriyeti, Eswatini, Fiji, Filipinler, Gürcistan, Grenada, Haiti, Honduras, Hindistan, İran, İsrail, Jamaika, Karadağ, Katar, Kazakistan, Kolombiya, Kongo, Kore Cumhuriyeti, Kuzey Makedonya, Lao Demokratik Halk Cumhuriyeti, Malezya, Maldivler, Mauritius, Nijerya, Palau, Paraguay, Samoa, Sırbistan, Suudi Arabistan, Sierra Leone, Singapur, Sri Lanka, Şili, Timor-Leste, Türkiye, Uganda, Ukrayna, Uruguay, Ürdün ve Venezuela*”. See <https://www.singaporeconvention.org> (Last Online Access 20 February 2020).

216 Chua (n 25) 1; Özel (n 26) 1191 et seq.; Erdoğan (n 26) 189; Yazar (n 26) 155-156; Özsunay, ‘Singapur Sözleşmesi’ (n 25) 32; Kaya (n 26) 982; Erkan (n 27) 84; Mohs, Rusch and Bossard (n 14) 3. On June 1958, the Convention on the Recognition and Execution of Foreign Arbitral Awards was adopted in New York (Christina Ungeheuer, *Die Beachtung von Eingriffsnormen in der internationalen Handelsschiedsgerichtsbarkeit* (Europäische Hochschulschriften: Reihe 2, Rechtswissenschaft; Bd. 1857, Peter Lang 1996) 28).

217 Mohs, Rusch and Bossard (n 14) 3; Zeller and Trakman (n 25) 449; Yazar (n 26) 155; Kaya (n 27) 983; Erkan (n 26) 83.

218 Özel (n 26) 1195; Zeller and Trakman (n 25) 449.

219 Kaya (n 26) 984; Özel (n 26) 1195.

Institution<sup>220</sup>. One of the main objectives in relation to the stipulation of the Swiss Rules of Mediation of 2019 was accordingly to harmonize the mediation rules foreseen by the Swiss Chambers' Arbitration Institution with the Singapore Convention on Mediation. The Swiss Rules of Mediation revised on 1 July 2019 were among the first corporate regulations on mediation meeting the requirements of the Singapore Convention that was signed on 7 August 2019<sup>221</sup>.

According to the Swiss Rules of Mediation of 2019, submission of approved copies of settlement agreements being given by the Secretary of the Swiss Chambers' Arbitration Institution is accepted to meet the requirements of the Singapore Convention<sup>222</sup>. In our opinion, one of the most fundamental revisions in the Swiss Rules of Mediation of 2019 is the submission of approved copies of settlement agreements and approval documents by the Secretary of the Swiss Chambers' Arbitration Institution.

## VII. Evaluation of Expected Impact of New Revised Swiss Rules on Mediation

The Swiss Rules of Mediation of 2019, which were made effective on 1 July 2019 as a result of the updating and review of the Swiss Rules of Commercial Mediation of 2007 as stipulated by the Swiss Chambers' Arbitration Institution, will make a contribution to the increasing popularity of mediation in recent times and will also empower Switzerland as a center for mediation. In recent years, the Singapore Convention on Mediation has possibly been the most important development with regards to international mediation. The Singapore Convention on Mediation was accepted 7 August 2019 and was signed by 46 countries<sup>223</sup>. As establishing rules for mediation-stipulating provisions in conformity with the Singapore Convention is a current trend in the world, the Swiss Rules of Mediation of 2019 are at the forefront as an important source of regulation<sup>224</sup>. Regulations related to the certification of reconciliation agreements as stipulated in the 16th and 17th articles of the Swiss Rules of Mediation of 2019 have been introduced in light of the impact of the Singapore Convention and this is an indicator that the current developments are being considered<sup>225</sup>. In our opinion, the updating of the Swiss Rules of Commercial Mediation of 2007 and the existence of regulations in conformity with the Singapore Convention on Mediation will enable the application of settlement agreements signed as a result of mediation activities being realized within the body of the Swiss Chambers' Arbitration Institution

220 Mohs, Rusch and Bossard (n 14) 3.

221 See <https://hsfnotes.com/adr/2019/07/31/new-swiss-rules-of-mediation/> (Last Online Access: 16 March 2020).

222 See Art. 17 SRM.

223 Ergun Özsunay, 'Uluslararası Ticari Uzlaştırma Hakkında Uncitral Model Kanunu, 2002'yi Revize Ederek Onun Yerine Geçen "Uluslararası Ticari Arabuluculuk ve Arabuluculuk Sonucunda Yapılan Uluslararası Sulh Anlaşmaları Hakkında Uncitral Model Kanunu, 2018" (Türk Hukuku Bakımından Bir Değerlendirme)' (2019) 93 İstanbul Barosu Dergisi 16.

224 Peter F Phillips, 'New Swiss Rules of Mediation' <<http://www.businessconflictmanagement.com/blog/2019/08/new-swiss-rules-of-mediation/>> Last Online Access 16 March 2020.

225 Art. 16-17 SRM. For more information about the 16th and 17th articles of the Swiss Rules of Mediation of 2019, See Section V, F and G above.

outside of the national borders and will accordingly improve the attractiveness of mediation in Switzerland.

The Swiss Rules of Mediation have been designed to enable interaction with the Swiss Rules of International Arbitration introduced by the Swiss Chambers' Arbitration Institution and regulations emphasizing the relationship between mediation and arbitration have also been made<sup>226</sup>. Hence, according to Art. 18 of the Swiss Rules of Mediation of 2019, it will be combined with an arbitration judgment being continued as per the Swiss Rules of International Arbitration<sup>227</sup>. At the same time, as per the rule introduced by the 19th article of the Swiss Rules of Mediation of 2019, regulations have been made such that during a continuing arbitration procedure it could be possible for mediation to be conducted at the request of one of the parties<sup>228</sup>. As can be seen, there is a close relationship between mediation as foreseen with the Swiss Rules of Mediation of 2019 and arbitration as foreseen with the Swiss Rules of International Arbitration<sup>229</sup>. In our opinion, this situation will increase the popularity of arbitration in accordance with the rules of arbitration in Switzerland<sup>230</sup>. In this way, contributions will be made to make mediation become more attractive for enterprises and investors in Switzerland.

### VIII. Conclusion

In Swiss judgment system alternative dispute resolution methods pay an important role. Steps have been taken to make legal arrangements in Swiss Law with the aim to enable more effective usage of methods constituting alternatives for the classic government judgment way. In Swiss Law mediation has been arranged in 213rd-218th articles of Swiss Federal Code of Civil Procedure that was made effective on 1th of January 2011 and it has gained a legal ground. Hence, with the regulations being made in relation to mediation in Swiss legal system it was enabled for mediation to become institutionalized as an alternative dispute resolution method and it was tried to increase the interest of parties having dispute among them to apply for mediation.

While these developments took place in relation to *Ad Hoc mediation* in Swiss law, various changes and developments were also lived through in relation to institutional mediation. Swiss Chambers' Arbitration Institution that has published institutional arbitration and mediation rules with the aim to resolve private legal disputes by alternative ways in Switzerland provides service for parties having dispute among themselves for a significantly long period. Leading Commercial and Industrial

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226 Mohs, Rusch and Bossard (n 14) 2.

227 Art. 18 SRM. Also compare: Articles 23-24 SRCM.

228 Art. 19. SRM.

229 See Section V, E, 1 above

230 Işık, 'İsviçre' (n 10) 463-464.



Chambers of Switzerland (*Basel, Bern, Geneva, Ticino, Vaud and Zurich*) having the objective of providing advanced dispute resolution services have come together in 2004 and they have harmonized arbitration rules and Swiss Chambers' Arbitration Institution (SCAI) has been established. Swiss Chambers' Arbitration Institution which is an unbiased and independent private institution in Switzerland has first of all accepted uniform Swiss Rules of International Arbitration which were made effective on 1th of January 2004 with the aim to resolve international commercial disputes. Afterwards rules relating with arbitration within body of Swiss Chambers' Arbitration Institution have been revised and Swiss Rules of International Arbitration (SRIA) ("*Swiss Rules 2012*") have become effective on 1th of June 2012. With the aim to resolve the disputes among parties in an effective way, Swiss Chambers' Arbitration Institution has also brought up regulations relating with mediation in addition to arbitration rules being stipulated within its body. Accordingly, Swiss Chambers' Arbitration Institution has accepted Swiss Rules of Commercial Mediation in 2007. The parties having commercial disputes among them have found the opportunity to resolve their disputes in a fast, effective and less costly way by means of Swiss Rules of Commercial Arbitration of 2007. With the acceptance of mediation rules within body of Swiss Chambers' Arbitration Institution in 2007, it was enabled to create a bond between mediation and arbitration. Although the number of disputes being resolved with mediation in Switzerland remains in the shadow of arbitration, the number of disputes resolved as per Swiss Rules of Commercial Mediation of 2007 has increased gradually through the years. For a period of twelve years until 2019, Swiss Rules of Commercial Mediation of 2007 have helped parties to resolve their disputes as being commercial and interest focused. At the same time, if the parties wish to resolve the disputes among them as per Swiss Rules of Commercial Mediation of year 2007 being brought up by Swiss Chambers' Arbitration Institution, they can attain high level of success.

Swiss Chambers' Arbitration Institution which has published various rules with the aim to resolve the disputes among the parties in Switzerland, has revised Swiss Rules of Commercial Mediation of 2007 on 1th of July 2019. Since the time they were made effective, Swiss Rules of Commercial Mediation of 2007 have been revised for the first time. Hence, new Swiss Rules of Mediation (SRM) being revised on 1th of July 2019 were made effective. Swiss Rules of Mediation of 2019 provides a legal frame in order to resolve the disputes among parties amicably with the help of an unbiased and independent third person by means of mediation. New Swiss Rules of Mediation being reviewed aims to clarify the language used in mediation rules that are provided to implementers by adopting a comprehensive and serious user consultancy and to simply it and to facilitate their usages with respect to various types of disputes. In this context, the purpose of revisions being realized is to promote the usage of mediation rules more by clarifying, shortening and simplifying their contents.

Stages relating with mediation process being brought up with Swiss Rules of Mediation of 2019, show similarity to Swiss Rules of Commercial Mediation of 2007. Hence, following 2019 revision people wishing to apply for mediation by means of new Swiss Rules of Mediation being reviewed will first make a request for mediation. Accordingly, mediation procedure being realized within body of Swiss Chambers' Arbitration Institution starts with a request and continues with selection and assignment of mediators and then it is realized with mediation agreement and mediation procedure and as the mediation activity is finalized, it is completed with certification of settlement agreement. As it can be seen, the stages being realized as per the new Swiss Rules of Mediation being brought up by Swiss Chambers' Arbitration Institution can be summarized and shortly defined as: "*mediation request*", "*selection and assignment of mediator*", "*realization of mediation procedure*", "*finalization of mediation activity*" and "*certification of settlement agreement*".

As per the new Swiss Rules of Mediation being revised, one (or all) of the parties will submit its/their request for mediation to the Secretary of Swiss Chambers' Arbitration Institution and make a request. According to Mediation Rules of 2019, various arrangements relating with starting of mediation have been clarified in article 2. Accordingly, mediation request will be submitted in one of the languages of English, German, French or Italian as per the rules specified in Annex A to one of the offices of Secretary. Furthermore, mediation request can be transmitted to Secretary by *e-mail* or by *other electronic means*. If mediation request is submitted in a valid and complete way, it will be passed on the selection and assignment of mediator as per the regulations that are stipulated in articles 3-10 SRM.

According to new Swiss Rules of Mediation mediator could be one person or more in number. The parties will jointly determine the mediator who will help them resolve the dispute. It will be required for the mediator being selected by parties to be also confirmed by Swiss Chambers' Arbitration Institution afterwards. New Swiss Rules of Mediation enables for *co-mediators* to be determined if it is requested by the parties. Again, with respect to the assignment of mediator "*simplified designation procedure*" in article 5 has been brought up in relation to the assignment of mediator.

After the assignment of mediator, Secretary of Swiss Chambers' Arbitration Institution will transmit the mediation file to the mediator. Hence, unless it is determined otherwise by the parties, mediation activity will be realized at the Secretary office where mediation request was made. Regarding mediation procedure, rules relating with the procedure specified in articles 11-15 SRM shall be complied with. In this respect the parties can realize mediation activity with an attorney or representative if they wish (Art. 12 SRM). *Confidentiality* is a rule with regards to mediation activity (Art. 13 SRM). For this reason, mediator could have discussions with the parties in

separate sessions. Therefore, during mediation process confidentiality will be applied. Swiss Rules of Commercial Mediation of 2007 were also enabling for mediator to have separate meetings when it was appropriate. Furthermore, in article 11(3) of Swiss Rules of Mediation of 2019, an arrangement has been made such that unless it is explicitly specified and unless participants give the authorization to mediator to disclose such information obtained in different meetings, they will be kept confidential. On the other hand, in Swiss Rules of Commercial Mediation of 2007, the particular about whose consent was required has not been specified.

Mostly seen way of finalizing the mediation activity is where parties reach an agreement about dispute resolution. However, as per the revised Swiss Rules of Mediation it has not been stipulated that the only way of ending the mediation process is where the parties reach agreement. Accordingly, as per article 16(1) of Swiss Rules of Mediation of 2019 mediation activity could be finalized. Hence, mediator will immediately notify Secretary that mediation activity has been finalized by submitting a written document where the outcome of mediation activity has been stated.

In the new revised Swiss Rules of Mediation of 2019, previous Swiss Rules of Commercial Arbitration of 2007 have been shortened, simplified and clarified for user friendliness without changing the important parts and basic functionality of the rules. Thus, as being different from Swiss Rules on Commercial Mediation of year 2007, Swiss Rules on Mediation of 2019 are composed of 26 articles and not 31 articles. On the other hand, certain major changes were made with Swiss Rules of Mediation of 2019. We will explain the outcomes relating with major changes being brought to revised Swiss Rules of Mediation that were made effective on 1th of July 2019 by categorizing them as given below:

1) According to Swiss Rules of Mediation of 2019, mediation was not only limited with *commercial topics*. It has become a way to be applied with respect to private legal disputes. In order to attract attention to this particular, the word “*Commercial*” has been removed from Swiss Rules of Commercial Mediation of 2007 and the name has been amended by being defined as Swiss Rules of Mediation of 2019.

2) A new feature brought up with Swiss Rules of Mediation of 2019 is related with “*simplified designation procedure*” being established for the assignment of mediator. Hence, according to simplified designation procedure being stipulated in 5th article of Swiss Rules of Mediation of 2019, if the parties clearly reach an agreement or if the dispute amount is below 50.000 Swiss Francs, simplified designation procedure could be followed up in case the parties don't object to this. *According to our opinion*, simplified designation procedure will enable for mediator to be assigned more quickly and for the dispute among the parties to be resolved more quickly in the end.

3) A fundamental change being realized in Swiss Rules of Mediation of 2019 is related with the role of mediator being specified in 10th article. With the new rules a regulation has been made in a way to eliminate the doubts about the role of mediator. In this respect, clarification

has been made in the regulation of 10th article in Swiss Rules of Mediation of 2019 being accepted about whether mediator could express his opinions during the mediation process or not and whether he could make a proposal in case it is requested by the parties or not.

4) Another fundamental change brought up with Swiss Rules of Mediation of 2019 is related with establishment of “*Advisory Council for Mediation*” that could provide assistance in case any disputes arise in relation to wages of mediator. Hence, as per the regulation of article 24(4) of Swiss Rules of Mediation, it was stated that disputes relating with wages or expenses of mediator should be submitted to *Advisory Council for Mediation* within body of Swiss Chambers’ Arbitration Institution.

5) Regulations have been made in Swiss Rules of Mediation of 2019 with regards to dispute resolution ways including “*mediation*” and “*arbitration*” together. In Swiss Rules of Commercial Mediation of 2007, it was also enabled for dispute resolution methods including mediation and arbitration to take place. As it was the case with previous regulations, applications could be made for dispute resolution ways including mediation and arbitration together in accordance with 18th-19th articles of Swiss Rules of Mediation of 2019. In this context, editorial amendment has been made in 19th article of Swiss Rules of Mediation of 2019 which enabled for mediation to take place during the arbitration process. Accordingly, as per 19th article of Swiss Rules of Mediation if one of the parties or arbitrators wishes to resolve the dispute, they have by applying for mediation method during while the arbitration activity takes place within body of Swiss Chambers’ Arbitration Institution, this could be possible. A regulation relating with this particular is not stated in Swiss Rules of International Arbitration of 2012. However, there are no obstacles to avoid for referees or parties to apply for mediation by withdrawing from arbitration process while arbitration activity is taking place in accordance with Swiss Rules of Arbitration of 2012 within body of Swiss Chambers’ Arbitration Institution.

6) Developments relating with Singapore Convention with which it is planned to facilitate execution of international agreement documents being obtained by means of mediation, have also been effective in the revision of mediation rules being effective since 2007, on the date of 1th of July 2019. Hence, Swiss Rules of Mediation of 2019 are among the first regulations being in harmony with the developments foreseen with Singapore Convention. One of the main objectives relating with Swiss Rules of Mediation of 2019 was to harmonize mediation arrangements with Singapore Convention on Mediation.

Singapore Convention is almost one of the most important regulations relating with mediation in recent years. If it becomes successful, Singapore Convention will enable for applicability of reconciliation agreements across the borders. Swiss Rules of Mediation of 2019 being in conformity with Singapore Convention which enables applicability of settlement agreement being obtained with mediation in different countries will contribute to increasing popularity of mediation in the coming years.

## List of Abbreviations

|                     |  |
|---------------------|--|
| ABD                 | : Amerika Birleşik Devletleri                      |
| ADR                 | : Alternative Dispute Resolution                   |
| Am J Com L.         | : American Journal of Comparative Law              |
| Arb-Med             | : Arbitration-Mediation                            |
| Art.                | : Article  |
| AUE                 | : United Arab Emirates                             |
| AÜHFĐ               | : Ankara Üniversitesi Hukuk Fakültesi Dergisi      |
| Aufl.               | : Auflage  |
| BM                  | : Birleşmiş Milletler                              |
| Bond L. Rev.        | : Bond Law Review                                  |
| BSK                 | : Basler Kommentar                                 |
| C.                  | : Cilt   |
| CAS                 | : Court of Arbitration for Sport                   |
| cf.                 | : compare  |
| Cumb. L. Rev.       | : Cumberland Law Review                            |
| Çev.                | : Çeviren/Çevirmenler                              |
| Çev. Ed.            | : Çeviri Editörleri                                |
| Ed./Edit/Eds.       | : Editör   |
| EJS                 | : The European Judicial System                     |
| et seq.             | : et sequentes                                     |
| f/ff.               | : der/die folgende(n)                              |
| fn.                 | : footnote   |
| Geo J Leg Ethics    | : Georgetown Journal of Legal Ethics               |
| GmbH                | : Gesellschaft mit beschränkter Haftung            |
| GÜHFĐ               | : Galatasaray Üniversitesi Hukuk Fakültesi Dergisi |
| HPĐ                 | : Hukuki Perspektifler Dergisi                     |
| Hrsg.               | : Herausgeber                                      |
| IJCA                | : International Journal for Court Administration   |
| IJPL                | : International Journal of Procedural Law          |
| ILSA                | : International Law Student Association            |
| Int'l               | : International                                    |
| Int'l Arb           | : International Arbitration                        |
| Int'l Bus L J       | : International Business Law Journal               |
| InULR               | : Inonu University Law Review                      |
| IPRG                | : Bundesgesetz über das Internationale Privatrecht |
| İBD                 | : İstanbul Barosu Dergisi                          |
| İnÜHFĐ              | : İnönü Üniversitesi Hukuk Fakültesi Dergisi       |
| İÜHFĐ               | : İstanbul Üniversitesi Hukuk Fakültesi Mecmuası   |
| J Disp Resol        | : Journal of Dispute Resolution                    |
| JE Eur L            | : Journal of Eastern European Law                  |
| J. Int'l & Comp. L. | : Journal of International and Comparative Law     |
| J S Afr L           | : Journal of South African Law                     |
| Kap.                | : Kapitel  |
| Litig               | : Litigation                                       |
| Med-Arb             | : Mediation-Arbitration                            |

|                       |  |
|-----------------------|--|
| Mod L. Rev.           | : Modern Law Review  |
| MHB                   | : Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni        |
| MİHDER                | : Legal Medeni Usul ve İcra İflas Hukuku Dergisi                   |
| MÜHF-HAD              | : Marmara Üniversitesi Hukuk Fakültesi Hukuk Araştırmaları Dergisi |
| no                    | : Numara   |
| N.                    | : Nummer/Numara/Kenar Numarası/Paragraf Numarası                   |
| Ohio St J on Disp Res | : Ohio State Journal on Dispute Resolution                         |
| p./pp.                | : Page/pages   |
| Q. U Tech L & Just J  | : Queensland University of Technology Law and Justice Journal      |
| RIW                   | : Recht der Internationalen Wirtschaft                             |
| Rdn.                  | : Randnummer(n)  |
| S.                    | : Sayı   |
| SCAI                  | : Swiss Chambers' Arbitration Institution                          |
| SchwZPO               | : Schweizerische Zivilprozessordnung                               |
| Vol.                  | : Volume   |
| Y.                    | : Yıl  |
| SchwIPRG              | : Bundesgesetz über das Internationale Privatrecht                 |
| SMC                   | : Singapore Mediation Convention                                   |
| SRCM                  | : Swiss Rules for Commercial Mediation                             |
| SRM                   | : Swiss Rules for Mediation  |
| SRIA                  | : Swiss Rules of International Arbitration                         |
| Sw L Rev              | : Southwestern Law Review  |
| TAS                   | : Tribunal Arbitral du Sport                                       |
| TBBD                  | : Türkiye Barolar Birliği Dergisi                                  |
| UAE                   | : United Arab Emirates   |
| UK                    | : United Kingdom   |
| U Kan L Rev           | : University of Kansas Law Review                                  |
| UNCITRAL              | : United Nations Commission on International Trade Law             |
| Unif. L. Rev          | : Uniform Law Review   |
| Univ.                 | : University   |
| v.                    | : versus/karşısında  |
| Vol.                  | : Volume   |
| Y.                    | : Yıl  |
| YB on Int'l Arb       | : Yearbook on International Arbitration                            |

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